IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-693

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I. F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated,
Petitioners,

v.

THE UNITED STATES, *Respondent.*

EARL C. BERGER, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, above identified, pray that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment and orders made on remand by the United States District Court for the District of Columbia (set out *infra* in the Appendices A, C, D, F, G and H) which deprive

petitioners of substantial property without due process of law, which are impermissible under constitutional and procedural precepts, as detailed hereinafter. Petitioners pray that on a hearing the judgment and orders be reversed.

OPINIONS BELOW

On November 12, 1974, the United States Court of Appeals for the District of Columbia Circuit, rendered an Opinion (App. B) which mandates recovery of all damages sustained by the teacher-petitioners who were employed by the Government. That Opinion entitles the teachers to entire compensation earned since April 14, 1966. The Opinion is published at 506 F.2d 1306, 165 U.S. App. D.C. 267; only the pertinent portions of the Opinion are annexed here at App. B. Portions containing tables to be used to compute back-pay are not pertinent to this Petition.

On remand to implement the Opinion on appeal the U.S. District Court for the District of Columbia expressly disallowed damages in full that accrued since April 14, 1966, and also disallows legal interest they are entitled to by 28 U.S.C. Sec. 2411 (App. L); and denied their real attorney, Mr. Earl C. Berger, virtually almost all of his contractual retainer fees, and disallows all expenses. The judgment on remand is annexed hereto insofar as the above factors are pertinent (App. A).

Petitioners appealed only from the above mentioned adverse factors of the judgment made on remand. On July 1, 1976 the U.S. Court of Appeals (for the District of Columbia Circuit) summarily affirmed the judgment on remand, prior to the filing of all briefs on

appeal, and denied a hearing thereon. That Court did not state any reasons for such summary affirmance. (App. F).

Orders made subsequent to remand are annexed hereto in the Appendix, including Orders for a partial stay of distribution, and Orders denying reconsideration. Prior to the filing of this Petition for a Writ of Certiorari this Supreme Court denied a motion for a partial stay of distribution. It is hoped that this Court will now reconsider such a partial stay, and give instructions for placing the funds pertaining to this case in an interest bearing escrow account, to protect all parties.

The Judgment and Orders pertinent to this Petition with dates of entry, are annexed as Appendices, viz:

A. Judgment on remand entered June 30, 1975;

B. Court of Appeals decision of November 12, 1974, reported at 506 F.2d 1306 and 165 U.S. App. D.C. 267;

C. Order entered November 7, 1975 by remand court striking motion and petition to amend judgment;

D. Order of remand court denying partial stay pending appeal, entered March 24, 1976;

E. Motion for summary affirmance of judgment on remand, filed April 16, 1976;

F. Order entered July 1, 1976 granting summary affirmance of judgment also denying motion for partial stay;

G. Order by Court of Appeals, entered July 14, 1976, extending time to file motion for reconsideration and hearing en banc—extended to July 30, 1976;

H. Order, Court of Appeals, entered August 18, 1976, denying reconsideration and a hearing en banc.

Thereafter, but prior to filing this Petition for a Writ, this Court denied petitioners' motion for a partial stay of distribution.

JURISDICTION

This Court has jurisdiction for this Petition under 28 U.S.C. Sec. 1254 (App. J). This case involves teachers employed by the U. S. Government. The U. S. District Court had jurisdiction under 28 U.S.C. Sec. 1346 (App. K). The teachers' salaries are governed by P.L. 86-91 (1959) as amended by P.L. 89-391 (1966).

This Petition for certiorari was filed less than 90 days from the Court of Appeals Order of August 18, 1976 which denies reconsideration and a hearing (App. H).

QUESTIONS PRESENTED

The following Questions are presented, based upon the following undisputed facts: The judgment denies petitioners entire compensation to which they are entitled under the decision of the Court of Appeals made November 12, 1974; the judgment on remand also invalidates the matured retainer made with the petitioners; the remand court made its said judgment without Notice to petitioners' lead counsel and thereafter denied a hearing or inquiry as to these factors. Thereafter the Court of Appeals denied a hearing thereon, and summarily affirmed the judgment prior to the filing of all briefs.

The foregoing was made possible as a result of associate counsel for plaintiffs making a stipulation with the defendant without the authority or consent of petitioners or their lead counsel. That stipulation was presented to the Court without Notice to petitioners' lead counsel. Said associate counsel changed over to the opposite side of the case after the Court of Appeals' decision of November 12, 1974 became non-appealable. Cole & Groner, Esqs. (CG), associate attorneys, were never substituted in place of Mr. Berger, petitioners' actual attorney.

Under the judgment all contingent retainer contracts made prior to litigation are rendered invalid only because based on a percentage fee, and for no other reason.

The Court of Appeals declined to give any of the petitioners a hearing and summarily affirmed prior to the filing of all briefs, thus the situation presented raises the following Questions:-

1. Whether petitioners have been deprived of their property without due process of law, contrary to Constitution Amendments V and XIV, also contrary to specific Rule of Procedure, F.R.C.P. 19 and 60(b); also contrary to express procedure provided for in the judgment itself.

2. Whether attorneys associated to assist petitioners' attorney, are authorized to give away substantial portions of property belonging to petitioners without petitioners' consent, and also change over to the opposite side of the case.

3. Whether it is an unauthorized exercise of judicial legislation for courts to in effect repeal or amend

statutes of Congress which statutes govern public policy, which judicial action discriminates against the public's right to seek recovery of their property by retaining attorneys on a contingent fee basis which they otherwise could not afford to finance. Or is it the sole province of Congress to legislate public policy?

4. Whether, where a Court of Appeals has rendered its decision and on implementation of the decision the remand court deprives the successful parties of substantial portions of their property without a hearing or proper inquiry: Can that same Court of Appeals summarily affirm such a judgment prior to the filing of all briefs pertaining thereto, and thereby alter and change its prior decision that became non-appealable, without a hearing showing changed circumstances if any? And at the same time validate unauthorized acts by attorneys? Does not such action constitute judicial legislation of new public policy and create a serious conflict of decisions of this Court and courts in the other Circuits?

5. Whether since the Opinion of the Court of Appeals mandates that the teachers "should receive what has been rightfully and legally theirs since April 14, 1966" the right to such full and entire damages should also include damages to repair their losses incurred as a result of ongoing inflation. (The dollars they will now receive will be worth much less than the dollars they should have been paid years before.)

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Constitution: Amendment V that guarantees "No person shall be deprived of his property without due process of law."

Amendment XIV, the equal protection clause, which guarantees that the "privileges and immunities" of all persons shall be protected without discrimination because of status, and that their property shall not be taken "without due process of law."

Statutes: The Civil Rights Act of 1964 which augments the above Constitutional provisions.

28 U.S.C. Sec. 1254 (1) conferring jurisdiction on this Court;

28 U.S.C. Sec. 1346(a)(2) authorizing suits for back-pay;

28 U.S.C. Sec. 2411 authorizes legal interest;

28 U.S.C. Sec. 2678 allows 25% attorney fees in this case.

Federal Rules of Civil Procedure Nos. 19, 52, and 60(b).

STATEMENT OF THE CASE

As the facts are undisputed it is appropriate to relate them in summary fashion.

The action at bench is for back-pay by classroom teachers for services rendered in the Overseas Dependents Schools (ODS) operated by the Department of Defense (DOD), who have been underpaid salaries mandated by Public Law 86-91 (July 17, 1959), 74 Stat. 21 (1959), *as amended* by Public Law 89-391 (effective April 14, 1966) 80 Stat. 117, 20 U.S.C. Sec. 901 et seq. The ODS schools are located in 30 foreign countries wherever our Armed Forces are stationed. On the average from 7,200 to 7,500 classroom teachers are employed each year. By reason of turnover, this

action involves the salaries of about 19,500 teachers over the 10 years involved. The teachers are citizens from all of the 50 States. They are university graduates with degrees of BA, BS, MA, MA+30 and Ph.D's.

Since at least 1955, in fact even prior to 1955, the teachers were underpaid some 27% less than their statutory salaries. The teachers retained attorney Earl C. Berger to represent them in 1955. Mr. Berger has specialized in adversary litigation since 1928,[1] is considered also to be quite qualified concerning Government administrative practices, and for many years has represented the U.S. Government in suits against foreign nationals and foreign sovereignties to recover damages sustained by our Armed Forces.

Mr. Berger pursued all avenues of administrative relief without results, and thereafter was instrumental in obtaining a remedial statute, P.L. 86-91 (1959), however the DOD failed to honor that statute, continuing to underpay the teachers by approximately 27%. So Mr. Berger returned to Congress to obtain further relief. Congress amended P.L. 86-91 (1959) by PP.L. 89-391 (1966) supra, effective April 14, 1966, mandating "salaries equal to "salaries for similar services" in the United States school districts. But again, the DOD refused to pay such statutory salaries. This stubbornness and discrimination by the DOD

[1] Mr. Berger was admitted in the Courts of New York in 1928, and also the Federal Second Circuit; U.S. Supreme Court, 1936; California courts, 1937; 9th Federal Circuit 1941 where he tried 52 cases for the Government in the anti-Nazi Program; the HICOG Courts, W. Germany, 1955; U.S. Military Courts, 1955; Conseil Juridique, Paris, France, 1958; U.S. Court of Claims, 1965, and in various other jurisdictions on motion; U.S. Court of Appeals, D.C. Circ. 1976.

required four separate actions, including appeals, besides two special Acts of Congress. Finally, on November 12, 1974, the U.S. Court of Appeals for the District of Columbia Circuit, awarded the teachers

> ". . . In addition to an injunction against the condemned practices, they should receive what has been rightfully and legally theirs since April 14, 1966 . . . Moreover, none of the usual justifications for barring retroactive application of a judicial decision apply to this case. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *James* v. *United States*, 366 U.S. 213 (1961); *Comment, Legal Aspects of the Use of 'Ordinary Simple Interest'*, 41 U. Chi. L. Rev. 141, 150-51 (1972)." (App. B at pp. 40-42)

That decision by the Court of Appeals (App. B), *March et al.* v. *United States* (D.C. Cir. 1974) is reported at 506 F.2d 1306, 165 U.S. App. D.C. 267.

However, on remand the District Court ruled that in hundreds of instances where a teacher's back pay which accrued during the more than 4 years pending litigation aggregated more than $10,000 per teacher, all sums over a total of $10,000 could not be recovered even by supplemental procedures, and the judgment requires all teachers to execute full and final releases for all claims:

> "G. No ODS teacher shall recover more than $10,000 in damages . . . This section shall prevail notwithstanding any other provision in this Judgment . . . she shall be entitled to recover no more than $10,000 damages from April 14, 1966 to date of this Judgment."
>
> /s/ June L. Green, Judge (App. A, p. 7a)

The judgment omits and disallows legal interest although petitioners are entitled to interest under 28 U.S.C. Sec. 2411 (App. L).

In addition, the Court ruled that Mr. Berger, petitioners' lead counsel, could not have either his fees as provided in the retainer agreement made prior to suit (App. Q) because based upon a percentage (and for no other reason) although his 25% contingent fees are authorized by 28 U.S.C. Sec. 2678 (App. M). The Court whimsically reduced same to 2% instead of 25%, (App. A, pp. 10a, 11a) and disallowed reimbursement of expenses incurred as provided in the retainer, although the teachers themselves submitted sworn statements urging the Court to let them honor their contract for fees and expenses out of the fund Mr. Berger succeeded in obtaining for them. No motion was made to shift fees and expenses onto the wrongdoer, which would have been justified because of the defendant's unremitting obstreperous misconduct, requiring the teachers to engage in costly, complex litigation in order to vindicate public policy statutes enacted by Congress (P.L. 86-91 as amended by P.L. 89-391 of 1966). The Court summarily struck (App. C) the teachers and Mr. Berger's motion and petition which included the teachers' sworn statements requesting the Court to let them honor their contract, and thus they were denied a hearing or proper inquiry. The Order striking that motion and petition is predicated upon a bare Conclusion, wholly unsupported by Findings required under F.R.C.P. Sec. 52 (App. N). That Order notes that the motion is "untimely" "not within F.R.C.P. 60(b) and that the relief sought "is precluded by law" (App. C).—bare Conclusions.

Under F.R.C.P. 19 (App. N) both Mr. Berger and the teachers must be afforded a hearing on any judgment that affects them. In addition, the Judgment, itself, retained jurisdiction for two years (until at least July 1, 1977) to hear any and all matters pertaining to same, and was quite timely:

> "8. *Retention Of Jurisdiction* (par. VI) (p. 15, App. A) The Court recognizes that questions of detail will arise . . . This Court shall retain jurisdiction over this matter for the resolution of any disputes, and other implementation of this Judgment and the decision of the Court of Appeals herein, and to consider such motions or other matters as either party shall duly put before it." (App. A, p. 11a-12a)

Nevertheless, the Court summarily struck petitioners' justified motion to amend and correct the Judgment, depriving them of their property and depriving them of their right to a hearing, their day in court, contrary to due process under law.

It is appropriate to explain that while Mr. Berger is a duly admitted attorney in various other jurisdictions, not being a resident practitioner in the District of Columbia, he could not technically be shown on the pleadings as "attorney of record" for plaintiffs, only as "Of Counsel". Therefore Mr. Berger arranged with the local Washington, D.C. law firm of Cole & Groner, Esqs. (CG) to be shown as attorneys of record; however, Mr. Berger was chief counsel and lead counsel throughout.

CG authored a written agreement for 50% of Mr. Berger's fees, and added that

> "4. Neither CG (meaning Cole & Groner) nor you (meaning Earl C. Berger) shall, without the prior

written consent of the other, enter into any settlement of the litigation."

In spite of this caveat, CG, without the teachers' authority and consent, and without Mr. Berger's consent, entered into a stipulation whereby substantial portions of the teachers' damages (already adjudicated by the Court of Appeals) were remitted and given to the adjudged wrongdoer—the defendant, by forgiving payment of fully accrued damages and forgiving legal interest, and also vitiating Mr. Berger's matured retainer contract for fees and expenses, reducing fees to 2% instead of 25% and excluding all expenses, same to be absorbed by Mr. Berger out of the "2%", and then share that whimsical amount with CG.

Mr. Berger's expenses, at this point, were far from liquidated, because it was recognized that it might take another two years to compute each teacher's entitlements. As 19,500 teachers are involved, and basic salaries varied in each of the 9 years prior to judgment, 157,500 separate computations would have to be made. Such computations would require ascertainment of withholding taxes to be deducted, deduction of FICA, retirement contributions, deductions of ratable portions of attorney fees and expenses, deduction of insurance premiums, etc.

On learning of this unauthorized stipulation Mr. Berger objected strenuously, but CG admonished Mr. Berger not to contact the attorneys for the defendant, on the ground that he was not technical attorney of record, and to stay away from the Department of Justice without suggesting a valid reason. Mr. Berger remained in Washington for the purpose of letting

the Court know what happened. However the defendant obtained two continuances on the ground of funerals defendant's attorneys wished to attend. A third specific date for hearing was left open, with assurances that Mr. Berger would be given Notice, but Mr. Berger was not given notice and the stipulations between CG and defendant's attorneys were presented and approved in his absence. At the time of this hearing the defendant contended that Mr. Berger's retainer was outlawed by the case of *Pete et al.* v. *United Mine Workers'*, etc., (D.C. Circ. 1975) 517 F.2d 1275, and the Court agreed, saying

> "The Court: I don't see somehow . . . how the Court can go on a basis of percentages on the basis of these cases—*Pete* and *Mine Workers'*, etc." (Transcript, June 25, 1975, p. 2)

thus 25% by way of fees, plus expenses, was changed to 2% less expenses incurred and to be incurred to compute the teachers' thousands of separate computations.

Pete, supra, was decided on entirely different grounds, namely, the petitioning attorneys did not litigate that case and establish the defendants' liability which resulted in the fund. Other, prior attorneys did that. The petitioning attorneys were latecomers, who boarded the salvaged ship after it was saved by prior attorneys. The petitioning attorneys were therefore limited to an hourly fee for simply distributing the Miners' money to them. Moreover, the petitioning attorneys procured illicit 33% "contingent retainers" from ill, disenfranchised, illiterate coal miners. Hence the Court in that case merely invoked its inherent equity powers to do equity. Whereas in the case at bench the retainer agreement was made

prior to suit, between highly educated university graduates holding degrees of BA, BS, MA, MS, MA+30 and Ph.D.'s, who want to honor their contract.

In addition to giving away their *cestuis'* property without authority or consent of the *cestuis,* CG changed over to the opposite side of the same case. When Mr. Berger moved the Court to be heard in the premises, CG interposed opposition which resulted in the Court striking his motion. When Mr. Berger perfected an appeal therefrom, CG, without the authority or consent of the teachers, filed a Notice of Appearance "for appell*ees*, the teachers" (sic); and before all briefs were filed, CG, alone, (without the real appellee, the defendant), moved for summary affirmance of the questioned judgment, without further proceedings (App. E)[2] and their motion was granted (App. F) without a hearing and without indicating any reason for such summary affirmance. When Mr. Berger moved the Court of Appeals for reconsideration and a hearing CG again opposed same, and on August 18, 1976 the Court of Appeals denied Berger's said motion, including a request for a partial stay of only so much of the fund that represented retainer fees.

By reason of the premises, these undisputed dispositive facts and governing law, your petitioners herewith present this Petition for a Writ of Certiorari, to the end that substantial, novel questions of law be settled; to the end that serious conflict of decisions of this and other Courts be corrected; to the end that judicial legislation be corrected; to the end that once a Court

[2] CG's motion for summary affirmance (App. E) was based on the sole "Argument" that the District Court did not abuse its discretion when it struck the petitioners' Motion to Amend Judgment.

of Appeals' decision and opinion has become non-appealable, that the same Court ought not sanction and approve of the alteration of its prior decision unless on a showing of changed circumstances; and to the end that officers of this Court (here CG) be deterred from giving away their cestuis' property and also change over to the opposite side of the same case.

Under F.R.C.P. 19, Mr. Berger, as well as his clients, are indispensable persons and parties to any proceeding under which they are affected by the judgment. *Bry-Man's Inc.* v. *Stute* (5th Circ. 1963) 312 F.2d 585 makes Mr. Berger an indispensable party concerning his fees. The decision conflicts with *Doylo* v. *Veterans Admn.,* 501 F.2d 817 (1974, D.C.Circ.) which authorizes 25% attorney fees for advocating claimants' just claims against the Government—and not only for past services but authorizes fees for future benefits as well. Here Mr. Berger claims no fees for the future benefits the teachers will receive in subsequent years. *Burich* v. *United States,* 170 Ct. Cl. 139, clearly holds that in all cases where back-pay continues to accrue pending suit, all such damages, *entire damages,* are recoverable. *Burich* is based upon this Court's denial of certioriari (373 U.S. 392) (1963) in the case of *Friedman* v. *United States,* 310 F.2d 181 (1962). *Gesellschaft* v. *Brown,* 78 F.2d 410, 412, 64 U.S. App. D.C. 357 (1935) holds that where an attorney has acted for a party he cannot thereafter assume a position hostile to the client in the same matter. The *Petition of Trinidad Corp.,* (2d Circ. 1955) 229 F.2d 423, 450, holds that an attorney cannot stipulate to reducing his client's claims without the client's consent. *Preveden* v. *Hahn,* (S.D. N.Y. 1941) 36 F.Supp. 952 holds that an attorney cannot do so without the client's express

authority (36 F. Supp. 952). *United States* v. *Preston* (9th Circ. 1965) 352 F.2d 352 authorizes a stay of distribution of funds pending appeal—wherein the attorney sought 25% fees. (citing Supreme Court cases, *Cohen* v. *Beneficial Loan,* 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 and *Meddaugh* v. *Wilson,* 151 U.S. 333, 14 S.Ct. 356, 38 L.Ed. 183. *Freeman* v. *Ryan,* (1968 D.C.Circ.) 408 F.2d 1204, approves of placing funds, to be distributed, in an escrow interest bearing account, whereby both the distributees and their attorneys are not harmed, but are aided by the interest being earned. In the case at bench Mr. Berger's request for placing undistributed portions of the fund in an interest bearing account was rejected by the remand court (App. D) and the Court of Appeals (App. F). In *Emeny,* et al v. *United States,* Slip. Op., December 17, 1975) the Court of Appeals awarded the successful claimants' attorney fees and all expenses amounting to $341,346 incurred to obtain a judgment for less than such expenses in a judgment for $221,880. And in the case of *Alyeska* v. *Wilderness Pipeline, etc.,* this Supreme Court reiterated the long honored rules that clients and attorneys are free to negotiate fees, and that courts may not invade the province of Congress which alone can legislate public policy pertaining to attorneys' fees,—44 L. Ed 2d 141. (1975).

REASONS FOR GRANTING THE WRIT

1. The Judgment Deprives Petitioners of Their Property Without Due Process of Law.

This Court and other courts have uniformly ruled that a hearing and "proper inquiry" are indispensable predicates to any judgment, without which "No person . . . shall be deprived . . . of property, without due

process of law; . . ." Amendments V and XIV. The judgment in this case cannot be squared with these Constitutional guarantees, nor with the Rules that augment these guarantees, F.R.C.P. 19 (App. N) and Rule 60(b) (App. P.), which specify that all persons having an interest in or affected by a judgment are entitled to a hearing and proper inquiry. These principles are fundamental. "A judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected." (*Restatement, Judgments,* Ch. 2, Sec. 6.)

Amendment XIV requires universality so that " . . . the privileges and immunities of citizens of the United States . . ." shall not be abridged. The Civil Rights Act of 1964 augments this guarantee against discrimination for any reason.

The Court of Appeals opinion and decision of November 12, 1974 in this case (on prior appeal No. 72-1816, reported at 506 F.2d 1306, App. B) awarded the teachers full and *entire* compensation due them since April 14, 1966:

> " . . . the teachers had a statutory right to receive the pay that they now demand as damages . . . they have suffered a recognizable legal injury. In addition to an injunction against the condemned practices, they should receive what has been rightfully theirs since April 14, 1966 . . . the right to recover the damages from the party in default is implied. . . Moreover, none of the usual justifications for barring retroactive application of a judicial decision apply to this case. See *Linkletter* v. *Walker,* 381 U.S. 619 (1965); *James* v. *United States,* 366 U.S. 213 (1961); *Comment, Legal Aspects* of the Use of *'Ordinary Simple Interest',* 41 U. of Chi. L. Rev. 141, 150-151 (1972)." . . .

> We hope this decision will finally resolve a dispute that has already lasted too long . . ." (App. B at pp. 36a-37a)

The case at bench was commenced November 20, 1970. It required 4 years and some months to reach a non-appealable decision, *supra.* The judgment on remand, to implement that decision was made June 27, 1975; during that long period additional damages accrued, in many instances to about 100% more than when action was commenced in 1970. However the judgment deprives petitioners of all damages over $10,000:

> "*Judgment Of Liability.* (G). "No ODS teacher shall recover more than $10,000 . . . notwithstanding any other provision of this judgment. . ." (App. A, p. 7a)

and also deprives them of legal interest which they are entitled to by 28 U.S.C. Sec. 2411 (App. L)

> ". . . a suit for compensation due and payable periodically is, by its very nature, a 'continuing class' which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due. *Friedman* v. *United States,* 159 Ct. Cl. 1, 310 F.2d 181 (1962), *cert. denied,* 373 U.S. 932 (1963); *Cannon* v. *United States,* 137 Ct. Cl. 104; 146 F. Supp. 827 (1956)."—*John Burich* v. *United States,* 177 Ct. Cl. 139, 143.

The judgment was made *without Notice* to petitioners' lead counsel who was in charge of this case. When he learned of same he timely moved and petitioned the court for a hearing to inquire into the matter of *remitting* the said accrued compensation to the ad-

judged wrongdoer, but the Court struck that motion and petition summarily (App. C).

That judgment made in the absence of Mr. Berger, lead counsel throughout, also invalidates his matured contingent retainer on the sole ground that it is based upon a *percentage,* payable by the teachers out of the fund Mr. Berger created, even though the retainer is free of the slightest suggestion of any inequitable factors, and said retainer fully conforms with 28 U.S.C. Sec. 2678 (App. M). The teachers presented sworn statements advising the Court that they indeed wished to honor their retainer (App. Q, and App. R & S). But the Court summarily struck same (App. C) and thereafter the Court of Appeals summarily affirmed the judgment and Order striking the motion and petition for a hearing (App. E). Thus both the teachers and Mr. Berger were deprived of their property without a hearing or proper inquiry. Nor will the Constitutional guarantees, the statutory guarantees and the Rules providing for due process, be made in future situations if this judgment is allowed to stand (*Shelley* v. *Kraemer,* 334 U.S. 1).

Mention should also be made of the fact that the remand court expressly retained jurisdiction for two years, until July 1, 1977, to hear and resolve all matters that could arise under the interlocutory judgment (App. A, p. 15)[3] nevertheless summarily struck the

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[3] "VI (8) *Retention Of Jurisdiction.* The Court recognizes that questions . . . will arise in the enforcement and administration of this Judgment. . . . This Court shall retain jurisdiction over this matter for the resolution of any disputes, and other implementation of this Judgment and the decision of the Court of Appeals herein, and to consider such motions or other matters. . . ." (App. A, pp. 11a-12a and App. A p. 8-a).

motion and petition for a hearing pertaining to accrued damages, legal interest and attorney's fees.

2. The Decision Below Which Vitiates the Contingent Retainer Solely Because It Is Based on a Percentage Fee, Constitutes Judicial Legislation, Establishing New Public Policy, Although Only Congress Can Legislate Public Policy.

Congress enacted 28 U.S.C. Sec. 2678 establishing public policy for contingent fees in cases brought against the United States (App. M) allowing fees of 25%. The retainer in this case was made prior to litigation (see App. Q, example of retainers signed by some 3,000 teachers for 25% and reimbursement of expenses incurred.) No question was raised as to the fairness of the retainer contract. The teachers advised the Court that they wished to fully honor their retainer contract *supra,* sworn statements presented to the Court, but the Court summarily struck same (App. C).

The Court fixed fees at 2%, in lieu of 25% plus expenses. Its judgment requires counsel to absorb all expenses for this years long litigation out of the 2%. This occurred in the absence of Mr. Berger, the only party to the retainer, and was premised solely on the fact that any retainer based on a percentage of the salvaged property is invalid:

> "The Court: I don't see somehow . . . how the Court can go on a basis of percentages on the basis of these cases—*Pete* and *Mine Workers,* etc."
>
> —Transcript of June 25, 1975, p. 2.

Pete was decided on wholly different grounds, namely, because the retainer in that case (reported at 517 F.2d 1275) (D.C. Circ. 1975) was saturated

with inequitable, unsavory conduct on the part of the attorneys who obtained 33% "contingent" retainers from ill, disenfranchised, illiterate coal miners AFTER the litigation had already been won by OTHER, PRIOR attorneys; hence the Court was merely invoking its powers to equity to correct an unconscionable situation (but allowed the latecomers an hourly fee for collecting the already created fund). As the Court of Appeals in the case at bench summarily affirmed the remand court's misinterpretation, invalidating the retainer in this case only because based on a percentage, unless this Court corrects that decision it will create an unjustified conflict of decisions while authenticating the taking of property without a hearing or inquiry and the lack of due process. In addition, new public policy will have been judicially legislated by in effect repealing Congress's statute, 28 U.S.C. Sec. 2768, which establishes public policy governing percentage fees in actions against the United States government (App. M).

When this Court decided *Alyeska Pipeline* etc. v. *Wilderness Society,* et al, (May 12, 1975) 421 U.S. 39, 44 L. Ed. 2d 141, this Court reviewed the whole field and subject of attorneys fees and pointed out that attorneys may charge clients such reasonable fees and costs, as may be in accordance with general usage in the respective States, or as may be agreed upon between the parties. (*Trustees* v. *Greenough,* 105 U.S. 527 (1881)). In *Huskisson* v. *Hawaii Dredging* (VII Circ. 1954) 212 F.2d 219-226, the Circuit Court awarded a straight line percentage fee to be paid out of U.S. Government funds, and to pay laborers their full salaries as regulated by Federal statute. In *Doylo* v. *Veterans Admn.* (D.C. Circ. 1974) 501 F.2d 817, the

Court allowed the attorney 25% fees in a class action, not only for past services but also for services in the future. In the case at bench the teachers will benefit not only for salary losses in the past, but will pay no attorney fees for benefits to be enjoyed in the future.

Prior to filing this Petition for a Writ Mr. Berger asked this Court to partially stay distribution; only so much of the fund that should cover his fees and expenses, but the stay was not granted. It is hoped that this Court will now reconsider such a stay pending review.

3. The Affirmance of the Judgment Made on Remand Validates Unauthorized Acts on the Part of Attorneys Who Exceeded Their Authority and Who Also Changed Over to the Opposite Side of the Same Case.

Mr. Earl C. Berger, petitioners' lead counsel, their only legal counsel since 1955, not being a resident practitioner in the District of Columbia, could not be shown as technical attorney of record for plaintiffs, therefore arranged with the local Washington, D.C. law firm of Cole & Groner, Esqs. (CG) to be shown as attorneys of record, with Mr. Berger shown throughout as "Of Counsel." CG were not made parties to the retainer contract; they never saw or consulted with the teachers. CG kindly acknowledged Mr. Berger's role in the case by their letter following the favorable decision on the first appeal. See App. I. However, thereafter CG stipulated with the wrongdoer to remit to the wrongdoer substantial portions of the teachers' accrued back pay. CG did not have the teachers' authority to do this, or to remit legal interest, or to virtually rescind Mr. Berger's retainer to which they are not parties. They did this clearly contrary to their own agreement

in writing, which they authored, not to settle any part of the litigation without prior written authority (supra, pp. 11-12). After the teachers authorized only Mr. Berger to appeal from the judgment on remand, CG, without any authority, filed a Notice of Appearance as attorneys for appellees (sic), the teachers. A strange thing. The teachers wanted to protect their property by their appeal; not the opposite. And thereafter CG opposed every ancillary motion made by Mr. Berger in support of the appeal; and to top matters off, CG alone, without the real appellee (the defendant), moved for summary affirmance of the judgment (App. E).

This strange situation can only be corrected by this Court. Officers of the Court should not be encouraged to indulge in wholly unauthorized acts (remit clients' property: *Ricketts* v. *Pennsylvania RR* (2d Cir. 1946) 153 F.2d 759, 769; *United States* v. *Beeke,* 180 U.S. 527 (1901)), and also change over to the opposite side of the same case. *Gesellschaft* v. *Brown* (1935), U.S.App. D.C. 357, 78 F.2d 410, 412.

An additional reason is suggested: because petitioners have been deprived of their statutory salaries for so many years, it would be just and meet for this Court to also rule that because of the substantial prejudice suffered by not being paid as their salaries became due and payable, the dollars they will ultimately be paid will have been rendered considerably less valuable by reason of ongoing, mounting inflation, and therefore that factor should be taken into consideration so that they may realise entire compensation. The defendant had the use of petitioners' dollars for all the years in question.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment.

Respectfully submitted,

EARL C. BERGER
499 Hamilton Avenue
Palo Alto, California 94301

Attorney and Counsel for Petitioners

Of Counsel:

JOHN W. BERGEN
Plunkett Street
Lenox, Mass. 01240

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3437-70

VIRGINIA J. MARCH, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

Judgment

(June 30, 1975)

This cause having been remanded to this Court by the United States Court of Appeals for the District of Columbia Circuit for further proceedings consistent with its Opinion in the Appeols herein which were docketed in that Court as Nos. 72-1860 and 72-2062; the parties having jointly submitted to the Court this Judgment as one which most faithfully and effectively implements the Opinion of the Court of Appeals with due and just regard to the interests and rights of all parties, including all members of the class of Plaintiffs; the Court having held a bearing thereon and being fully advised in the premises; and having concluded after full consideration that this Judgment should be entered;

IT IS, THEREFORE, THIS 27TH DAY OF JUNE, 1975, ADJUDGED, ORDERED AND DECREED, as follows:

I.

DEFINITIONS

1. As used herein:

A. "Act" shall mean the Overseas Teachers Pay and Personnel Practices Act, Public Law 86-91, 73 Stat. 213,

as amended, effective April 14, 1966, by Public Law 89-391, 80 Stat. 117, Title 20, U.S.C. §§901 *et seq.*

B. "ODS teacher" shall mean those (and "ODS teacher", one of those) who were employed in positions in the Overseas Dependents Schools administered by the Department of Defense at any time on or after April 14, 1966, the compensation and rates of compensation of which were governed by the Act; and shall include those duly designated to assert the legal rights of any ODS teacher.

C. "Stateside teachers" shall mean those (and "Stateside teacher", one of those) who were employed in positions of a level of duties and responsibilities comparable to ODS teachers in urban school jurisdictions in the United States of 100,000 or more population, as provided in the Act.

D. "Plaintiffs" shall mean all ODS teachers with the exception of Rocco A. Trecosta, Aida M. Guevarra, Llewellyn Lieber and Elizabeth B. Dozier.

E. "Plaintiffs' counsel" shall mean Cole and Groner, P.C., 1730 K Street, N.W., Washington, D.C. 20006, unless otherwise specified herein.

F. "Defendant" shall mean the United States of America.

G. The feminine shall include the masculine.

H. "Each" or "particular" School Year, educational level, Class, Step, or other element of damages or the computation of damages shall include portions thereof, and dence and require *pro rata* adjustments for any changes pertinent to an individual ODS teacher.

I. The 1965-1966 School Year shall be computed as one-fifth of a School Year, so that computations may be effective as of April 14, 1966, the effective date of the Act; thus damages for the 1965-1966 School Year shall be one-fifth

of the damages computed for that School Year in accordance with this Judgment.

J. "Years of teaching experience" shall be the number of years of teaching experience as specified by the ODS teacher in her application for employment, subject to verification by Defendant for any year for which it has a reasonable question based on the nature of the experience claimed that the said experience would normally be acceptable as teaching experience.

II.

JUDGMENT OF LIABILITY

2. To conform to the Opinion of the Court of Appeals, Defendant shall compensate each ODS teacher, in accordance with her compensation Class and educational level, for each School Year as provided in this Section:

A. At a rate of basic compensation equal to the average of the range of rates for Stateside teachers for the same School Year;

B. At the Step for each ODS teacher most closely comparable to that into and for which a Stateside teacher of identical or most closely comparable years of teaching experience would have been placed and compensated; and

C. For ODS teachers compensated on a daily rate, upon the basis of a 190-day School Year and rates paid to Stateside teachers for that same School Year.

3. As damages for not having compensated ODS teachers in the past in accordance with Section 2 of this Judgment, Defendant shall pay each ODS teacher in accordance with the rates of basic compensation appearing in the Tables described in Subsection A of this Section, subject to the conditions set forth in Subsection B of this Section, as illustrated by the examples in Subsection C of this Section.

A. The Tables attached hereto and incorporated herein show for each School Year the rates of basic compensation which were in fact paid to ODS teachers and those which should have been paid (i.e., those which were paid to Stateside teachers during that School Year and to ODS teachers during the following School Year). Each Table consists of a set of four lanes, designated and showing the following:

Table	*Educational Attainment*
A	Bachelor's Degree
B	Master's Degree
C	Master's Degree Plus 30 Hours Credit
D	Doctor's Degree

Table I shows the rates which were paid in the 1965-1966 School Year; Tables II-XI show the following:

Table	Rates Which *Should Have Been Paid in School Year*	Rates Which *Were Paid in School Year*
II	1965-1966	1966-1967
III	1966-1967	1967-1968
IV	1967-1968	1968-1969
V	1968-1969	1969-1970
VI	1969-1970	1970-1971
VII	1970-1971	1971-1972
VIII	1971-1972	1972-1973
IX	1972-1973	1973-1974
X	1973-1974	1974-1975
XI	1974-1975	

B. The maximum number of years of teaching experience to be allowed for each ODS teacher for each School Year shall be as follows (to correspond to the ceilings which were, the data showed, being observed for Stateside teachers):

1. For School Years 1965-1966 through 1970-1971, inclusive, 7 years.

2. For School Year 1971-1972, 8 years.

3. For School Years 1972-1973 through 1974-1975, inclusive, 10 years.

C. To compute damages for each School Year, the compensation which was actually paid shall be subtracted from the compensation which should have been paid as specified in Section 2 of this Judgment.

The following illustrations assume an ODS teacher with a Bachelor's Degree in Class I. An ODS teacher who was employed in School Year 1966-1967 and had no previous teaching experience and thus was and should have been placed in Step 1 should have received $5,340 (which was actually paid in Step 1 in School Year 1967-1968), but actually received $5,075, and is thus entitled to $265 in damages for that School Year; had she been employed in School Year 1967-1968, she would have been placed in Step 2, and should have received $5,955 (which was actually paid in Step 2 in School Year 1968-1969), but she was actually paid $5,570, so that she is entitled to $385 in damages for that School Year.

An ODS teacher who was employed in School Year 1968-1969 and was placed in Step 3 should have received $6,630 (which was actually paid in Step 3 in School Year 1969-1970) but actually received $6,195, and is thus entitled to $435 in damages for that School Year; had she been employed in School Yeor 1969-1970, she would have been placed in Step 4 and should have received $7,395

(which was actually paid in Step 4 in School Year 1970-1971), but she was actually paid $6,885, so that she is entitled to $510 in damages for that School Year.

An ODS teacher who was employed in School Year 1971-1972 and had ten years teaching experience should have been placed in Step 9 and should have been paid $9,560 (which was actually paid for Step 9 in School Year 1972-1973), but was in fact placed in Step 3 and paid $7,585, so that she is entitled to $1,975 in damages for that School Year; had she been employed during School Year 1972-1973, she should have been placed in Step 10 and received $10,165 (which was actually paid at Step 10 in School Year 1973-1974), but was placed in Step 4 and received $8,085, so that she is entitled to $2,080 in damages for that School Year.

D. For an ODS teacher receiving damages for any School Year pursuant to either or both of the preceding Sections who was entitled during that School Year to any differential or allowance dependent upon or determined by her rate of basic compensation, by way of illustration a differential paid as a percentage of the rate of basic compensation, additional damages shall be computed for that School Year in the additional amount of differentials of allowances which she would have received upon the basis of the amounts described in either or both of the preceding Sections.

E. For ODS teachers paid on a daily rate, the amount of damages per day shall be computed upon the basis of the rates paid pursuant to Subsections A and B of this Section divided by 190.

F. For all ODS teachers receiving damages by virtue of any of the foregoing, appropriate adjustments shall be made, as applicable, with respect to: (1) Civil Service Retirement, (2) Social Security (FICA), (3) Federal Employees Group Life Insurance, (4) Federal Income Tax

Withholdings, and (5) any and all other similar or related rights and obligations.

G. No ODS teacher shall recover more than $10,000 in damages pursuant to this Judgment. This Section shall prevail notwithstanding any other provision of this Judgment; so that if the computation of damages for an ODS teacher under the provisions of this Judgment shall exceed $10,000, she shall be entitled to recover no more than $10,000 damages from April 14, 1966 to date of this Judgment.

III.

Procedure for Payment of Damages

4. The procedure for the payment of damages shall be in accordance with this Section.

A. Defendant shall (i) obtain the records necessary to complete a computation of the amount due under this Judgment, (ii) complete such computation, and (iii) as promptly as practicable upon the completion of such computation send a Notice, certified mail, return receipt requested, similar in substance and form to that appearing in Appendix A attached hereto and incorporated herein, with a copy to Plaintiffs' counsel, in the case of each ODS teacher who falls within any of the following Subsections, as provided below.

1. For ODE teachers whose names appear on the payrolls of ODE teachers which include June 1, 1975, Defendant shall complete the computations and send the Notices within four months after the date of this Judgment.

2. For ODS teachers whose names appear on the payrolls of ODS teachers which respectively include May 1, 1966 and every November 1 and May 1 thereafter to and including November 1, 1974 (other than those ODS teach-

ers falling within Paragraph 1 above), Defendant shall obtain the records and commence the computations as promptly as practicable, shall endeavor to complete such computations and send the Notices on as regular a basis as possible, and shall complete such computations and send such Notices within eighteen months after the date of this Judgment.

3. For any ODS teacher or person claiming to be an ODS teacher by or on behalf of whom Defendant has received information enabling Defendant to obtain her records and compute the amount due her under this Judgment (information such as her current name and address, the name under which she was an ODS teacher, and her Social Security Number) provided that such information is received by Defendant on or before July 1, 1977, Defendant shall comply with Paragraph 2 above.

B. In such computations the number of years of teaching experience shall be as specified by the ODS teacher in her application for employment, unless Defendant objects in her application for employment, unless Defendant objects thereto for any year because it has concluded after investigation that the nature of the experience claimed would not normally be acceptable as teaching experience for Stateside teachers, and in such cases the Notice specified hereinafter shall include the number of years claimed on the application, the years objected to by Defendant and the basis upon which each such objection is made.

C. If in the case of a person claiming to be an ODS teacher the records do not identify such person as an ODS teacher, Defendant shall promptly notify Plaintiffs' counsel as to the records which have been searched and obtained and the information indicated therein; and shall promptly notify such person that she has not been identified as an ODS teacher. Within three months after receipt of such notification she may submit to the Department

of Defense, Office of Overseas Dependents Education, Washington, D.C. 20301, with a copy to Plaintiffs' counsel, Isaac N. Groner, Esquire, Cole and Groner, P.C.. 1730 K Street, N.W., Washington, D.C. 20006, such proofs as she has of her entitlement as an ODS teacher to damages pursuant to this Judgment. Upon such submission the parties shall meet and attempt to resolve the matter.

D. If the ODS teacher shall execute and submit the Certification and Release attached to the Notice, Plaintiffs' counsel shall file, for signature by the Court, Judgment in the form prescribed in Appendix B attached hereto and incorporated herein. Defendant shall promptly thereafter make the payments in the amounts and to the recipients specified in the Notice as prescribed in this Judgment.

E. If the ODS teacher has any objection, she shall within three months after receipt of her Notice file in writing a specification of the particular objection or objections and a submission in as much detail as possible of the facts and proof in support thereof, filing the same by certified mail in duplicate with copies sent to Isaac N. Groner, Esquire, Cole and Groner, P.C., 1730 K Street, N.W., Washington, D.C. 20006; and Department of Defense, Office of Overseas Dependents Education, Washington, D.C. 20301. Upon any such filing, the parties shall endeavor to resolve the matter. If they are unable to resolve it, the matter shall be submitted to this Court for a determination of the extent of liability.

Upon the disposition of the objection, the Court shall enter Judgment for the individual ODS teacher involved in the form prescribed in Appendix B attached hereto and incorporated herein.

F. Within sixty days after its mailing the first Notice referred to in the preceding Section, Defendant shall notify Plaintiffs' counsel of each of the Notices which

have been returned without being received by the addresses; and each thirty days thereafter, Defendant shall notify Plaintiffs' counsel of each of the additional Notices which had been returned without being received by the addressee. Upon ascertaining or receiving notice of a more current address, Defendant shall again send the Notice to the ODS teacher, and upon any receipt of a Notice the procedures provided in this Section shall be followed.

IV.

Counsel Fees

5. Upon the basis of all relevant factors, as appearing in the record herein at the hearing before this Court on June 25, 1975 and in the written submissions of the parties, including the value to the class of the services rendered, the number of hours of professional services which have been rendered, the unique and unprecedented nature of the legal issues involved in this case and their complexity and difficulty, as reflected in the necessity for appeals and the prolonged history of this entire matter including prior litigation on behalf of ODS teachers directly related hereto, the fact that prior Court decisions had been adverse to Plaintiffs' position and this is the action in which all of Plaintiffs' rights were established, the skill and expertise of the principal attorneys, the fact that no compensation has been received by Plaintiffs' counsel, was the fact that the members of the class were notified that they would be represented by Plaintiffs' counsel in accordance with the Order for Maintenance of Class Action and Approving Notice of Pendency thereof, entered by this Court on January 7, 1972, and only three members of the class elected not to be represented by Plaintiffs' counsel as their attorneys, the contingent nature of the representation and the reliance by counsel thereon, and the representations which have been filed

with the Court and stated in the hearing before the Court by Plaintiffs' counsel (including Earl Berger, Esquire, who is entitled to, and will receive, a heretofore "agreed-upon" share of the counsel fees awarded herein), the Court finds that reasonable counsel fees shall be established and paid as follows: 2% of the gross total recovery to which each individual ODS teacher is entitled by virtue of this Judgment shall be paid by Defendant to Plaintiffs' counsel.

V.

Notices

6. Notice shall be given of this Judgment, by publishing the same or a summary agreed upon by counsel, as promptly as practicable in the National Education Association *Reporter* and the *American Teacher* and in all Overseas Dependents Schools operated by the Department of Defense in locations plainly accessible to teachers employed therein.

7. In addition, both parties are authorized and directed to publicize this Judgment by all practical means available to them, including but not limited to newsletters, press releases and other announcements and publications, and posting of notices and requiring the posting of notices in locations in which former ODS teachers are likely to see them, such as post exchanges and bulletin boards in Stateside schools.

VI.

Retention of Jurisdiction

8. The Court recognizes that questions of detail will arise in the enforcement and administration of this Judgment. Counsel are encouraged and authorized to reach agreement on the resolution of such questions and to adapt this Order to the necessities of practical situations as they arise, consistent with the principles provided herein. This

Court shall retain jurisdiction over this matter for the resolution of any disputes, and other implementation of this Judgment and the decision of the Court of Appeals herein, and to consider such motions or other matters as either party shall duly put before it.

/s/ June L. Green
JUNE L. GREEN
United States District Judge

(NOTE by E. C. Berger. The Judgment has attached to it various tables of rates of pay upon which computations will be based, and other matter deemed unimportant for this Petition)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 72-1816

VIRGINIA J. MARCH, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA

No. 72-2062

VIRGINIA J. MARCH, ET AL.

v.

UNLTED STATES OF AMERICA, *Appellant*

Appeals from the United States District Court
for the District of Clhmbia

(D.C. Civil Action No. 3437-70)

Decision

Decided November 12, 1974

Isaac N. Groner, with whom *Alan Y. Cole* and *Charles R. Both,* were on the brief, for appellants in No. 72-1816 and appellees in No. 72-2062.

Edwin E. Huddleson, Attorney, Department of Justice, with whom *Harold H. Titus, Jr.,* United States Attorney

at the time the brief was filed, and *Walter H. Fleischer,* Attorney, Department of Justice, were on the brief, for appellants in No. 72-2062 and appellee in No. 72-1816. *Morton Hollander,* Attorney, Department of Justice, and *John A. Terry* and *James M. Hanny,* Assistant United States Attorneys, also entered appearances for appellant in No. 72-2062 and appellee in No. 72-1816.

Before FAHY, *Senior Circuit Judge,* and ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Virginia March and six other teachers brought this class action in the District Court to challenge the methods used by the Department of Defense in fixing basic salaries and other compensation for teachers employed in its Overseas Dependents Schools (ODS) system.[1] Briefly, the teachers allege that, in violation of the Overseas Teachers Pay and Personnel Practices Act,[2] the Department (1) computes annual salaries on the basis of the preceding year's wages, rather than the current year's wages, for similar teaching positions in the United States;

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[1] The class comprises approximately 19,500 teachers employed after April 14, 1966 by the Department in its Overseas Dependents Schools. Jurisdiction in the District Court was invoked under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), as a "civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon [an] . . . Act of Congress. . . ." In a class action such as this, jurisdiction thereunder turns, not upon the aggregate amount of the claims the members of the class, but upon the amounts claimed individually by those members. *Brown* v. *United States,* 365 F.Supp. 328, 338 n.5 (E.D.Pa. 1973); *Northern Natural Gas Co.* v. *Grounds,* 292 F.Supp. 619, 644 (D.Kans. 1968), *rev'd on other grounds,* 441 F.2d 704, *cert. denied,* 404 U.S. 951 (1971). *Cf. United States* v. *Louisville & Nashville R.R.,* 221 F.2d 698, 701 (6th Cir. 1955). No individual claim in this case exceeds $10,000.

[2] Act of July 17, 1959, Pub.L.No. 86-91, 73 Stat. 213, 20 U.S.C. §§ 901 *et seq.* (1970).

(2) places teachers in lower salary steps than they would have been placed in comparable school districts in the United States; (3) limits credit for past teaching experience to two years; (4) makes no allowances for compensatory time; and (5) calculates the daily rate of compensation, for teachers paid on a daily basis, on a 210-day school year rather than the usual 180 or 190 days. The Department concedes that its computations are performed substantially as alleged by the teachers.

In particular, the teachers claim that these practices are inconsistent with Sections 4(a)(2) and 5(c) of the Act, which direct Department authorities to fix the "basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."[3] The teachers asked

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[3] Section 4 of the Act, as amended, provides:

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—

(1) the establishment of teaching positions;

(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population;

(3) the entitlement of teachers to compensation;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and ap-

for an injunction restraining the practices complained of, and for back pay assertedly due in accordance with the Act since April 14, 1966.[4]

There were no disputed issues of material fact, and the District Court dispoesd of the case on cross-motions for

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propriate to the purposes of this chapter.

(b) The regulations prescribed and issued by the Secretary of Defense under subsection (a) of this section shall become effective on such date as the Secretary of Defense shall prescribe but not later than the ninetieth day following the date of issuance of such regulations.

20 U.S.C. § 902 (1970). Section 5 of the Act, as amended, provides in pertinent part:

(a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 902 of this title. . . .

(b) Subject to section 203 of the Classification Act of 1949, the secretary of each military department—

(1) shall determine the applicability of paragraph (33) of section 202 of such Act, added by section 3 of this Act, to positions and individuals in his military department and

(2) shall establish the appropriate annual salary rate in accordance with this chapter for each such position and individual to which such paragraph (33) is determined to be applicable. . . .

(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. . . .

20 U.S.C. § 903 (1970).

[4] This date is the effective date of an amendment to the Act, on which the teachers' case is based. See Part I (C), *infra*.

summary judgment.[5] The court granted judgment for the teachers on only one of their claims, finding that the Department's policies of limiting credit for prior teaching experience to two years, and of placing ODS teachers in lower steps than they would have been placed in domestic school districts of 100,000 or greater population, violated the Act. As to the rest of the issues, the court granted judgment for the Government, holding that computation of annual salaries on the basis of salaries in the preceding year was consistent with the Act, and that the remaining practices challenged were reasonable exercises of discretion. The court permanently enjoined the Government from refusing to place and compensate ODS teachers in the steps most closely comparable to those in which they would have been placed in school districts in the United States;[6] on motion by the Government, this injunction was stayed pending appeal to this court. The court denied the teachers' prayer for damages representing back pay.

The Government appeals from the judgment in favor of the teachers; the teachers appeal the District Court's determinations on the balance of the issues in favor of the Government. From our reading of the Act and related materials, discussed below, two factors stand clearly at odds with the District Court's disposition of certain issues adversely to the teachers—the unquestionably plain language of the statutory provisions central to the controversy, and the

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[5] *March* v. *United States*, Civ. No. 3437-70 (D.D.C. May 31, 1972).

[6] The Government argues that the District Court was without jurisdiction to grant injunctive relief. The court denied the claim for damages for back pay, and the decided cases, says the Government, suggest that equitable relief can be granted in a Tucker Act suit only in aid of a money judgment. See, *e.g.*, *Blanc* v. *United States*, 244 F.2d 708, 709 (2d Cir.), *cert. denied*, 355 U.S. 874 (1957). Since we hold that the District Court erred in rejecting the teachers' prayer for damages, we find it unnecessary to reach that issue. See Part IV, *infra*.

express congressional purpose of a 1966 amendment to the Act. We are thus constrained to reverse the court's judgment in part, affirm it in part, and remand the case for further proceedings.

I. Historical Background

A. *The Period Prior to 1959*

Shortly after World War II, the United States established the Overseas Dependents Schools to provide educational facilities abroad for dependents of military and civilian personnel. The ODS system, we are told, is the ninth largest American school system, with over 180,000 students and approximately 7,000 teachers.[7]

Until 1959, ODS teachers were subject to the civil service laws and regulations. The application to ODS teachers of those general provisions, designed for federal civil servants who worked a regular twelve-month year,[8] created a number of economic inequities. Like stateside teachers, they worked the traditional nine- to ten-month school year. Unlike stateside teachers, however, they could not be paid during the summer months, or the Thanksgiving, Christmas or Easter recess periods,[9] nor could their salaries reflect "their academic background and qualifications, in accordance with the general practice in the United States."[10] As a result, the annual compensation of ODS teachers was substantially below that of their stateside counterparts. Congress sought to correct this situation by enactment in 1959 of legislation specifically addressing the Department's practices respecting overseas teachers.

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[7] Brief for United States at 4; Brief for Teachers at 4.

[8] See S.Rep. No. 141, 86th Cong., 1st Sess. 2 (1959).

[9] *Id.* See also H.R. Rep. No. 357, 86th Cong., 1st Sess. 2-3 (1959).

[10] S.Rep. No. 141, 86th Cong., 1st Sess. 2 (1959).

B. *The 1959 Overseas Teachers Pay and Personnel Practices Act*

The Senate report accompanying the bill that became the Act stated that the purpose of the bill was

> to provide a system of personnel administration for schoolteachers and certain school officers and other employees of the dependents schools operated by the Department of Defense in oversea areas comparable to the systems found in the majority of the public primary and secondary school jurisdictions in the United States.
>
> The proposed system recognizes and corrects deficiencies in the present system which the Department of Defense has identified and which long have been apparent.[11]

To remedy the deficiencies in compensation we have noted, the Act originally provided that ODS teachers were to be paid "in relation to the rates of basic compensation for similar positions in the United States."[12] The Department, pursuant to the Act, promulgated regulations to "conduct the employment and salary practices applicable to teachers and teaching positions . . . in accordance with [the] Act. . . ."[13] The only specific standard in the Act to guide the Department was a provision that the basic compensation for ODS teachers could not exceed the highest rate of basic compensation for public school teachers in the District of Columbia.[14]

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[11] *Id.* at 1.

[12] Act of July 17, 1959, Pub.L. No. 86-91, § 5(c), 73 Stat. 214 (1959).

[13] Act of July 17, 1959, Pub.L. No. 86-91, § 4(a), 73 Stat. 214 (1959).

[14] Act of July 17, 1959, Pub.L. No. 86-91, § 5(c), 73 Stat. 214 (1959).

In addition to the published regulations, the Department established two procedures that cemented the ODS teachers' annual wage rate considerably below that paid to stateside teachers. First, since Congress had limited appropriations for ODS to a specific amount per student, the Department interpreted the "in relation to" language of the Act as limiting the teachers' salaries by this "per pupil limitation." [15] Second, because Bureau of the Budget regulations prohibited federal agencies from budgeting for anticipated increases in wages or salaries based on prevailing rates outside the Federal Government,[16] the Department calculated the teachers' annual salaries by the preceding year's rate. The former policy has been discontinued, but the latter is still a key element of the Department's computation scheme.[17]

The teachers challenged the Department's interpretation, arguing that the Act required it "to take periodic action to raise [the teachers'] salaries to levels equal to those prevailing in the United States. . . ." [18] The Department answered that it was restricted by the per pupil limitation. This dispute resulted in a series of legal battles in which the courts uniformly upheld the Department's construction and its related practices.[19] The historical posture of the

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[15] See H.R. Rep. No. 519, 89th Cong., 1st Sess. 3 (1965).

[16] See Instructions for the Preparation and Submission of Annual Budget Estimates, Bureau of the Budget Circular A-11, § 13.4 (July, 1963).

[17] The legality of this practice is considered in Part III(A), *infra*.

[18] See *Mitchell* v. *McNamara*, 122 U.S.App.D.C. 224, 225, 352 F.2d 700, 701 (1965).

[19] *Mitchell* v. *McNamara*, *supra* note 18; *Crawford* v. *United States*, 376 F.2d 266 (Ct.Cl. 1967), *cert. denied*, 389 U.S. 1041 (1968); *Chambers* v. *United States*, 306 F.Supp. 317 (E.D.Va. 1969), *aff'd*, 434 F.2d 1312 (4th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971). These cases construed the text of the original Act, rather than the 1966 amendment. See note 37, *infra*.

case at bar was significantly altered, however, in 1966 when Congress again tried to bring ODS teachers' pay in line with salaries for teaching in comparable school districts in the United States.

C. *The 1966 Amendment*

In 1965, two congressional subcommittees held hearings, on a proposed amendment to the Act, that clearly and indisputably showed that ODS teachers were not receiving the compensation Congress had intended to provide.[20] In fact, in some respects the teachers had fared worse under the Act than they would have under the civil service laws and regulations.[21] The House Committee on Post Office and Civil Service reported that

> The Post Office and Civil Service Committee and the Congress understood that in enacting [the Act] they were providing a firm and reasonable formula for the payment of appropriate salaries to overseas teachers. That understanding has not proved out. [The proposed amendment] provides a standard which, although variable in amount, is positive because the precise dollar amounts in question are readily ascertainable. . . . The bill then goes on to direct and require that the overseas

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[20] See *Hearings on H.R. 6845 Before the Subcomm. on Compensation of the House Comm. on Post Office and Civil Service*, 89th Cong., 1st Sess. (1965); *Hearings on S. 2228 Before the Subcomm. on Civil Service of the Senate Comm. on Post Office and Civil Service*, 89th Cong., 1st Sess. (1965). Both bills were firm in their intent to remedy the inequities noted in the text.

[21] "The salaries of [ODS] teachers have suffered. Since 1959 their salaries have been increased twice, by a total percentage of 4.3. During the same perod, salaries for employees classified as GS-7 (the classification which these teachers had prior to 1959), have increased 21.5 percent, and teachers [*sic*] salaries in school jurisdictions of 100,000 or more have increased by 18.5 percent." S.Rep. No. 951, 89th Cong., 2nd Sess. 3 (1966).

teachers *shall* be paid salaries determined by the standard.[22]

The Committee further enunciated the purpose of the proposed amendment:

> [T]o establish a positive, reasonable, and fully effective legislative policy with respect to rates of compensation which shall be paid to teachers in the overseas dependents school system of the Department of Defense, under which policy the Department of Defense and the three military departments shall and must pay such teachers salary rates equal to the average range of salaries paid teachers having comparable levels of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. *This policy, and the mandatory payment of such equal salary rates, is consistent with, and will strengthen, the policy laid down by the Congress in the enactment of the Defense Department's Overseas Teachers Pay and Personnel Practices Act (Public Law 86-91), which thus far has not been effectuated in accordance with congressional intent.*[23]

The amendment, enacted in 1966, provided that ODS teachers were no longer to be paid "in relation to the rates of basic compensation for similar positions in the United States";[24] rather, they were to receive salaries "equal to" those of a defined class of teachers.[25] Congress thus delineated a compensatory scheme for ODS teachers that would put them on a par with stateside teachers. Perhaps Congress also hoped to end the perennial feud between the Defense Department and its corps of educators but, as this case illustrates, the dispute is still very much alive.

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[22] H.R. Rep. No. 519, 89th Cong., 1st Sess. 4 (1965) (emphasis in original).

[23] *Id.* at 2 (emphasis added).

[24] See text *supra* at note 12.

[25] See note 3, *supra*.

In our view, as discussed below, the clear purpose of the 1966 amendment was to guarantee ODS teachers the same salaries they would receive for performing the same duties in stateside schools. Indeed, it is difficult to read the Act any other way.

II. Elucidating the Act

When a court construes a statute, the starting point must be the language of the statute.[26] We have carefully examined the Overseas Teachers Pay and Personnel Practices Act and conclude that basic compensation for ODS teachers is to be calculated on a parity with basic compensation for teachers in the United States. It is well settled that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."[27]

To be sure, as the Government argues, this "plain meaning rule" does not "preclude consideration of persuasive evidence if it exists."[28] The Supreme Court has warned that

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[26] *United States* v. *Bass*, 404 U.S. 336, 339 (1971); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); *Zaimi* v. *United States*, 155 U.S.App.D.C. 66, 71, 476 F.2d 511, 516 (1973).

[27] *Caminetti* v. *United States*, *supra* note 26, 242 U.S. at 485. See also *Callanan* v. *United States*, 364 U.S. 587, 594-95 (1961); *United States* v. *Public Utils. Comm'n*, 345 U.S. 295, 312-13 (1953); *Sea-Land Serv., Inc.* v. *FMC*, 131 U.S. App.D.C. 246, 248-49, 404 F.2d 824, 826-27 (1968); *District of Columbia Nat'l Bank* v. *District of Columbia*, 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965).

[28] *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

> words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how "clear the words may appear on 'superficial examination.' " [29]

In our opinion, this admonition merely underscores the importance of construing this statute, if possible, to give effect to the congressional purpose. The Government has briefed in great detail the legislative history of the 1966 amendment and argues that it establishes that the Defense Department's interpretation is consistent with the "congressional understanding." The teachers, although they rely primarily on the plain meaning of the Act, have also briefed the legislative history in no less exhausting detail and argue that it fully supports their construction.

The strong support that the Government and the teachers respectively find in the hearings [30] and congressional debates [31] reinforces our conviction that this aspect of the legislative history is at most ambiguous and contradic-

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[29] *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943), quoting *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 544 (1940).

[30] "The individual opinions of witnesses at hearings are of dubious value in interpretation of legislation." *Potomac Passengers Ass'n* v. *Chesapeake & Ohio Ry. Co.*, 154 U.S.App. D.C. 214, 225, 475 F.2d 325, 336 (1973), citing *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *Pacific Ins. Co.* v. *United States*, 188 F.2d 571, 572 (9th Cir.), *cert. dismissed*, 342 U.S. 857 (1951); *United States* v. *Kuang Chen Fur Corp.*, 188 F.2d 577, 584, 38 CCPA 107 (1951); *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 80 U.S. App. D.C. 119, 122, 149 F.2d 507, 510 (1945), *aff'd*, 326 U.S. 446 (1946).

[31] It is of course undisputed that courts can consider congressional debates in construing legislation. See *United States* v. *O'Brian*, 391 U.S. 367, 383-84 (1968). But where, as here, they reflect individual interpretations that are contradictory and ambiguous, they carry no probative weight. See, *e.g.*, *NLRB* v. *Plasterers' Local Union*, 404 U.S. 116, 129-30 n.24 (1971).

tory,[32] and therefore should be ignored in favor of an application of the clear and precise statutory language and purpose here involved. Indeed, "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." [33]

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[32] See generally hearings cited *supra* note 25; 111 Cong.Rec. 19223-42 (1965). As one example, the Government relies on a statement by Representative Udall, a sponsor of the 1966 amendment, that claimed the practice of calculating ODS teachers' salaries on the basis of the preceding year's salaries for stateside teachers was consistent with Bureau of the Budget regulations.

> The salary-determination procedures of [the proposed amendment] are intended to require that the salary scheduled for a particular school year will be set in consideration of rates paid in school jurisdictions in the United States for the preceding school year. This is necessary because the Department of Defense budget must be prepared during the preceding year when salary schedules in the United States for the coming year cannot be determined. Under Bureau of the Budget regulations, departments may not budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages or salaries actually being paid can be considered.

111 Cong.Rec. 19234 (1965). The teachers counter with statements by Representative Udall, 111 Cong.Rec. 19234, 19237, 19239 (1965), and other congressmen. *Id.* at 19235 (remarks of Representative Stratton); *id.* at 19239 (remarks of Representative Broyhill). The teachers also point out that Rephesentative Udall joined in a 1969 committee report that criticized Department practices. H.R. Rep. No. 91-480, 91st Cong., 1st Sess. 7 (1969). See *Bobsee Corp.* v. *United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969). We note that this report, although written after passage of the 1966 amendment, was prepared by the same committee that pledged "a continuing review" to be certain that ODS teachers were paid their proper salaries. H.R. Rep. No. 519, 89th Cong., 1st Sess. 4 (1965).

[33] *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956). *Cf.* F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947).

The Government also argues that the congressional reports establish the validity of the Department's application of the Act. We disagree. The reports demonstrate a congressional intent consistent with the unequivocal statutory language,[34] which we find in some respects inconsistent with the current application of the Act.[35]

Recognizing the clarity with which Congress has expressed itself, we must determine whether present compensatory practices are consistent with the statute and the purpose it was enacted to carry out. Our duty in this regard, to paraphrase the Supreme Court,[36] is to place the statute and current practice side by side and see if the latter squares with the former.

III. Testing the Department's Compensatory Practices Against the Statutory Language

A. *Computation of Salaries Based on the Preceding Year's Rate*

The Defense Department calculates the teachers' current annual salaries by using the preceding year's salaries for stateside teachers of the class defined by the Act. We hold that this practice violates the statutory mandate that

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[34] See Part I(C), *supra*. Citations of the reports herein are not meant to supplant the court in its interpretative function. *See United States* v. *American Trucking Ass'n, supra* note 29, 310 U.S. at 544. Our references to the reports are simply "for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied." *FTC* v. *Raladam Co.*, 283 U.S. 643, 651 (1931). "A committee report represents the considered and collective understanding of those congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969); *United States* v. *O'Brian, supra* note 31, 391 U.S. at 385; *United States* v. *UAW Int'l*, 352 U.S. 567, 585 (1957).

[35] See Part III, *infra*.

[36] *United States* v. *Butler*, 297 U.S. 1 (1936).

ODS teachers are to be compensated "at rates *equal to* the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population." [37]

As the Government points out, the statutory language does not expressly designate the stateside salary year to be utilized in applications of the statutory formula. It is well settled, however, that words in a statute will be read according to their common usage, absent a contrary indication.[38] Surely the term "equal to," as it is commonly used and understood, means equivalent to a present com-

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[37] 20 U.S.C. §§ 902(a)(2), 903(c) (1970) (emphasis added), quoted in full *supra* note 3.

The Court of Claims reached the opposite conclusion in another case challenging this practice and seeking back pay. *Trecosta* v. *United States*, 194 Ct.Cl. 1025 (1971). The Court reasoned that "[a]lthough Congress was fully cognizant of past Department procedure . . . , no action was taken and no change contemplated." *Id.* at 1026. We are compelled to reach a different result. We agree that where an administrative agency has consistently given a statute an interpretation over a long time and Congress reenacts the statute without change, Congress might be presumed to have adopted the agency's construction of the statute. *Commissioner* v. *Flowers*, 326 U.S. 465, 469 (1946); *United States* v. *Cerecedo Hermanos y. Compania*, 209 U.S. 337, 339 (1908). This maxim, however, is not the last word; the Supreme Court has admonished that reenactment "is an unreliable indicium at best" to indicate "congressional satisfaction" with a statutory interpretation. *Commissioner* v. *Crenshaw Glass Co.*, 348 U.S. 426, 431 (1955). We believe that where, as here, "the law is plain, the subsequent reenactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938), citing *Iselin* v. *United States*, 270 U.S. 245 (1926); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740 (1931); *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 467-68 (1934).

[38] *Malat* v. *Riddell*, 383 U.S. 569 (1966); *Commissioner* v. *Brown*, 380 U.S. 563 (1965); *Williams* v. *W.M.A. Transit Co.*, 153 U.S. App.D.C. 183, 190, 472 F.2d 1258, 1265 (1972).

ponent, rather than past or future. If Congress had intended to key ODS teachers' salaries to the preceding year's salaries for stateside teachers, it could easily have specified such a standard.[39] Here Congress used the phrase "equal to" without qualification and, lacking manifestation of a different intent, we think temporal as well as monetary equality was contemplated.

We are no more impressed by the Government's assertion that the Department's interpretation of the Act should be accepted because it was adopted by the agency charged with principal responsibility for administering the Act.[40] We note initially that administrative construction of the statutory language under scrutiny in no way drew upon the experience or expertise of the Defense Department. The interpretative problem before the Department was the meaning of statutory language pertinent to a matter completely outside its field of specialty, but well within the area entrusted to the courts.[41] "Administrative construction is less potent than it otherwise would be where it does not rest upon matters peculiarly within the administrator's field of expertise." [42]

Moreover, the Department's interpretation could hardly lay claim to the presumption of accuracy that courts frequently accord to an agency's construction of a law it is legislatively empowered to oversee.[43] When it enacted the

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[39] See, *e.g., Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 156 (1944).

[40] See, *e.g., Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Lenkin* v. *District of Columbia,* 149 U.S.App.D.C. 129, 141, 461 F.2d 1215, 1227 (1972).

[41] See *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970).

[42] *Thompson* v. *Clifford,* 132 U.S.App.D.C. 351, 364, 408 F.2d 154, 167 (1968).

[43] See note 40, *supra,* and accompanying text.

1966 amendment, Congress made known its displeasure with the Department's failure to carry out the purpose underlying the Act in original form; indeed, the amendment was a direct response to that failure. The House Report accompanying the bill that eventuated as the 1966 amendment stated:

> The Committee on Post Office and Civil Service is deeply concerned at the treatment that has been accorded the overseas school teachers—a concern shared, it is believed, by many other Members of Congress—particularly in view of *the obvious failure to administer the salary provisions of* [*the original Act*] *as they were intended and expected by the committee and the Congress to be administered.* Without attempting to place the blame, and whether it be due to administrative unwillingness to shoulder the burden of obtaining necessary funds or disagreement with the policies of [the original Act], it certainly is essential that the problem be resolved without further delay.[44]

It is clear enough to us that here "the legislature itself has responded to [the Department's] past interpretation and administration of the legislation with severe censure," [45] and that "[t]he general presumption that the agency has correctly discerned and implemented the intent of the legislature[] would seem singularly inappropriate." [46]

Perhaps even more importantly, "[j]udicial obeisance to administrative action cannot be pressed so far" as to justify adoption of an administrative construction that "flies in the face of the purposes of the statute and the

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[44] H.R. Rep. No. 519, 89th Cong., 1st Sess. 3-4 (1965) (emphasis added). See text *supra* at note 23.

[45] *Cy Ellis Raw Bar* v. *District of Columbia Redevelopment Land Agency,* 139 U.S.App.D.C. 385, 390, 433 F.2d 543, 548 (1970).

[46] *Id.*

plain meaning of its words."[47] To accept the Department's interpretation respecting the stateside salary year on which ODS teachers' salaries are to be computed would be to forsake the unmistakable mission of the Act. We recognize that there is some authority for the Government's position in the congressional debates and hearings but, on the whole, this aspect of the legislative history is far from conclusive.[48] We find the Act and the committee reports clear and unequivocal as to the intent of Congress,[49] and our duty is to give that intent full effect.

B. *Salary Grades, Steps, and Prior Teaching Experience*

Salaries in both the ODS and stateside systems are classified by grades and, within each grade, are graduated by steps corresponding to prescribed qualifications and experience. In placing teachers at particular levels the Defense Department limits credit for prior teaching experience to two years, regardless of the quantum of actual prior experience. The teachers also allege that the Department limited the number of steps and assigned lower values to each step in violation of the Act.

The teachers claim that the "equal to" language of the statute[50] applies to all elements of the teachers' compensation and prohibits current Department procedures. The Government responds that many of these practices are not subject to the "equal to" standard, but rather are committed to the Department's discretion by other provisions.[51]

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[47] *Haggar Co.* v. *Helvering*, 308 U.S. 389, 398 (1940). See also *Thompson* v. *Clifford*, *supra* note 42, 132 U.S.App.D.C. at 363, 408 F.2d at 166; *District of Columbia* v. *Grimes*, 131 U.S.App.D.C. 360, 362, 404 F.2d 1337, 1339 (1968).

[48] See note 32, *supra*.

[49] See Part I(C), *supra*.

[50] 20 U.S.C. §§ 902(a)(3), 903(c) (1970), quoted *supra* note 3.

[51] See 20 U.S.C. §§ 902(a)(1), (3)-(10) (1970), quoted *supra* note 3.

Although we do not agree with the teachers' position that all facets of their compensation are subject to the requirement of equality with stateside teachers,[52] we do think salary grade, steps and credit for past teaching experience are essential ingredients of "basic compensation,"and therefore are covered by the "equal to" mandate of the Act.

Again, the focal point of the controversy is the meaning of the statutory language—"at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."[53] The Act undisputably obligates the Department to determine the *"average of the range of rates"* in the school districts specified. Once the average in those districts is determined, we think salary grades and steps for ODS teachers—which in the final analysis determine their basic annual wage—must match this average grade by grade and step by step. The House report makes this meaning clear:

> The effect of the reported bill . . . is to *require* that salaries paid teachers in the Department of Defense Overseas Dependents School System be *equal* to the average of the minimum, intermediate and maximum rates paid teachers holding positions of comparable levels of responsibility in urban school jurisdictions of 100,000 or more population in the United States, including the same average number of salary steps.[54]

This language echoes the plain import of the statutory language, which, as Congress intended, leaves "no room for the substitution of independent views or judgments by any

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[52] See Part III(D), *infra*.

[53] See note 3, *supra*.

[54] H.R. Rep. No. 519, 89th Cong., 1st Sess. 3 (1965) (emphasis in original).

Federal civilian or military official.'' [55] The Act thus requires the Department to give ODS teachers credit for prior experience on the same basis that such credit is accorded teachers in the specified stateside districts. Beyond that, the number of steps, the value of each step and the qualifications therefor must, as closely as practicable, equal the average for the specified districts.

The Government argues that the Department's practices with respect to these matters are incidental, and therefore within its discretion.[56] It also states that its ''practice for crediting past teaching experience is part of a system 'designed to produce a reasonable, simple, and understandable compensation program.' '' [57] Unless ''basic compensation'' is a term of art in the education field, for which no evidence is presented to us, this argument is unpersuasive. The Government would apparently have us believe that ODS teachers have only passing interest in their initial salary grades and steps, but we cannot accept this proposition. No more

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[55] *Id.* at 4.

[56] We are mindful of the Government's position that the practices in question are covered by the provisions of 20 U.S.C. §§ 902 (a)(1), (3)-(10). See note 3, *supra*. Undoubtedly, those provisions give the Department some discretion in determining certain conditions of ODS teachers' employment, but its discretion, as it pertains to fixing basic compensation, is plainly limited by the mandate of equality in 20 U.S.C. §§ 902(a)(2), 903(c). See note 3, *supra*. We must read the Act as a whole, and give effect to each of its provisions if possible, ''in light of the legislative policy and purpose.'' *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Our interpretation we think, firmly embraces both of these principles. To accept the Department's interpretation, however, would be to strike a crippling blow to the statutory scheme of equality, and to neutralize the obvious objective of the 1966 amendment. An administrative agency, like a court, lacks freedom to tailor its interpretation of a statute to its own notions of what is best, and thereby to negate its stated purpose. *State Dep't of Social Serv.* v. *Dublino*, 413 U.S. 405, 419-20 (1973).

[57] Brief for Government at 20-21.

for overseas teachers than for administrative bureaucrats can we imagine a view that qualifications for federal grade levels and steps are just ''incidental'' to basic salaries.[58]

Perhaps the Defense Department has constructed a simple and easily administered compensation program for ODS teachers, but neither fondness for simplicity nor an unwarranted interpretation of ''basic compensation'' can be permitted to frustrate the ordinary and natural meaning of the statutory language [59] and the manifest purpose of Congress to place ODS teachers on a par with their stateside counterparts.[60] We hold that the Department's construction of the Act in the respects discussed is clearly at odds with the intent behind the 1966 amendment.

C. *Daily Rates of Compensation*

The teachers also challenge the Department's practice of computing daily rates of compensation on the basis of a school year of 210 days rather than the normal school year of 180 to 190 days.[61] The Government argues that this procedure falls within the discretion of the Defense Depart-

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[58] The importance of the limit on credit for prior experience, for example, can be clearly shown. A teacher with a Bachelor of Arts degree and six years of prior teaching experience would have been placed at step 7 in a stateside school system during the 1969-70 school year; but the Department would have placed the same teacher at step 3 in an overseas position. Joint App. at 27 (affidavit of Earl C. Berger, Counsel for the Overseas Education Association). At that time, each step was worth $270, resulting in a loss of $1,080, which was exacerbated by use of the salary scale from the preceding year. See Part III(A), *supra*.

[59] See note 38, *supra*, and accompanying text.

[60] See Part I(C), *supra*.

[61] The discrepancy results because the Department includes the Christmas and Easter vacations as part of the school year for this purpose, while stateside schools exclude these days. In each case, the school year comprises between 180 and 190 working days. See 5 C.F.R. § 1601.7 (1974).

ment under Section 4(a)(7)[62] to prescribe regulations governing "the length of the school year or school years applicable to teaching positions."[63]

This provision certainly confers discretion in determining the length of the school year[64] but, with equal certainty, that discretion must be exercised in a reasonable manner[65] and consistently with congressional expressions in the statute.[66] The Department's present method of computing the daily rate does not comport with these criteria.

Current departmental regulations provide that the school year for ODS teachers "will consist of not more than 190

[62] The Government also argues that the discretion given by Section 4(a)(9), 20 U.S.C. § 902(a)(9) (1970), to promulgate regulations governing "quarters, allowances, and additional compensation for teachers," allows the Department to fix the year at 210 days for calculation of the daily wage rate. We cannot agree that this provision is relevant to this case. The first two categories in this section certainly do not apply. See 20 U.S.C. §§ 905, 906 (1970). Moreover, "additional compensation," as it is commonly understood, does not include computation of the daily wage rate, because that rate is merely a breakdown of the basic annual wage. Compare Part III(D), *infra*.

[63] 20 U.S.C. § 902(a)(7) (1970).

[64] Indeed, the Department might reasonably provide that the school year for ODS teachers consists of more than 190 working days. Once the number of working days is fixed, however, we think the statute requires the Department to fix the daily rate in the same manner as stateside schools. A major purpose both of the original Act and the 1966 amendment was to equalize ODS teachers' compensation and stateside teachers' salaries. See Part I, *supra*. The Government has not pointed to a single stateside jurisdiction that computes its daily pay rate in the fashion we are asked to approve. Thus we cannot infer that there is a basis for claiming that the current practice represents that in the average stateside school district.

[65] *E.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 413-14 (1971).

[66] *E.g., Hardin* v. *Kentucky Util. Co.,* 390 U.S. 1, 8 (1968).

working days."[67] In computing ODS teachers' daily rate of compensation, however, the Department uses a 210-day school year, derived from the number of calendar days in the school year, excluding Saturdays and Sundays but including Christmas and Easter recesses. There is no evidence in the record to indicate that this method of calculation has ever been used in any of the school districts referred to in the Act.

We think this practice is condemned by the requirement of equality defined in the Act, because the daily wage rate is an integral part of "basic compensation."[68] All elements of basic compensation governed by the statutory equality mandate, and the manifest purpose of the Act is to put ODS teachers and teachers in the United States on the same plane.[69] It is our understanding that stateside districts predicate all computations on actual working days —between 180 and 190 per year—and the Act requires the same of the Department.

D. *Compensatory Time*

The teachers also complain that the Department's regulations do not provide for allowances of compensatory time in the ODS system, while such allowances exist in similar poitions in stateside schools. It may be that stateside teachers accumulate compensatory time for such activities as attending PTA meetings, lesson preparation and grading papers. We hold, however, that these aspects of compensation are not part of "basic compensation" under Sections 4(a)(2) and 5(c),[70] but rather are committed to the Department's discretion under Sections 4(a)(8) and

[67] 5 C.F.R. § 1601.7 (1974).

[68] See note 62, *supra*.

[69] See Part I(C), *supra*.

[70] 20 U.S.C. §§ 902(a)(2), 903(c) (1970), quoted *supra* note 3.

4(a)(9) dealing with "the leave system" and "additional compensation."[71] Accordingly, this aspect of the District Court's judgment will not be disturbed.

IV. The Teachers' Rights to Damages

As we noted above,[72] the District Court found the Department's practices inconsistent with the statutory scheme in one respect. The court granted the teachers injunctive relief on that count,[73] but denied their claim for back pay damages.

The trial court gave no reason for denying the teachers' prayer for damages, and we are unable to discern any sound reason to support the denial. The teachers had a statutory right to receive the pay they now demand as damages.[74] As a direct result of the Department's erroneous interpretation and application of the Act, they have suffered a recognizable legal injury. In addition to an injunction against the condemned practices, they should receive what has been rightfully and legally theirs since April 14, 1966.[75] As the Supreme Court has declared, "[a] disregard

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[71] 20 U.S.C. §§ 902(a)(8), (9) (1970), quoted *supra* note 3. The teachers have not presented any evidence to contradict the District Court's finding that the Department's discretion has been "reasonably exercised." Instead, they argue that this part of the case is also subject to the strict equality standard discussed above. See Parts II(A), (B) & (C), *supra*. We think this argument ignores the ordinary meaning of the statutory language.

[72] See text *supra* at note 5.

[73] See text *supra* at note 6.

[74] See Part III, *supra*. Moreover, none of the usual justifications for barring retroactive application of a judicial decision apply to this case. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *James* v. *United States*, 366 U.S. 213 (1961); Comment, *Legal Aspects of the Use of "Ordinary Simple Interest,"* 41 U. Chi. L. Rev. 141, 150-51 (1972).

[75] See notes 1 & 4, *supra*.

of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[76]

V. Conclusion

The results we reach today are required by the language and purpose of the Act. Congress has twice tried to equalize the salaries of ODS and stateside teachers; the disparity in salaries has also been expressly condemned in committee reports. The basic compensation of ODS teachers, however, is still significantly below that of stateside teachers. We hope this decision will finally resolve a dispute that has already lasted far too long.

For the reasons stated in this opinion, we affirm the judgment granted in favor of the teachers. The judgment for the Government is reversed as to the calculation of salaries based on the preceding year, the computation of daily rates based on a 210-day year and the denial of damages. The balance of the judgment of the District Court is affirmed. The case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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[76] *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916). See also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Kentucky Util. Co.* v. *TVA*, 375 F.2d 403, 416-17 (6th Cir. 1966); *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201, 208-09 (6th Cir. 1961). There has been no suggestion that the named teachers, and those whom they represent, are not members of the class for whose benefit the statute was enacted.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3437-70

VIRGINIA J. MARCH, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

Order

(filed: Nov. 7, 1975)

A Petition to Amend Judgment entered herein on June 30, 1975 having been served on September 5, 1975, with supporting papers; Plaintiffs and Defendant having filed an Opposition thereto, Plaintiffs with supporting papers; Plaintiffs having filed a Motion to Strike Petition to Amend Judgment, with supporting papers; an Opposition having been filed thereto; and the Court being fully advised in the premises and having concluded that the Petition to Amend Judgment falls under Rule 59(e) of the Federal Rules of Civil Procedure and is untimely and may not be entertained by this Court pursuant to that Rule; that the Petition makes no showing of any ground that would warrant the invocation of Rule 60(b) and there is in fact no such ground; that the relief requested in the Petition has already been afforded by the Judgment or is precluded by law;

IT IS, THEREFORE, THIS 6TH DAY OF NOVEMBER, 1975, ORDERED that Plaintiff's Motion to Strike Petition to Amend Judgment shall be, and it is hereby, granted; and the Petition to Amend Judgment shall be, and it is hereby, stricken.

/s/ JUNE L. GREEN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Order

(filed March 24, 1976)

A Motion to Stay Proceedings in the District Court Pending Appeal having been filed with supporting papers; Plaintiffs and Defendant having each filed an Opposition thereto; and the Court being fully advised in the premises and concluding that there is no likelihood of success on appeal, that there is no sufficient showing of irreparable damage, that both parties, Plaintiffs and Defendant, would be substantially harmed by a stay, and that the public interest requires denial,

IT IS, THEREFORE, THIS 24TH DAY OF MARCH, 1976, ORDERED that the Motion to Stay Proceedings in the District Court Pending Appeal shall be, and it is hereby, denied.

/s/ JUNE L. GREEN
June L. Green
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2262

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR M. TINGLEY, LUCY I. E. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated, *Appellees,*

v.

THE UNITED STATES, *Appellee.*

EARL C. BERGER, *Appellant.*

Motion for Affirmance Without Further Proceedings

(filed April 16, 1976)

Appellees Virginia J. March, *et al.,* respectfully request the Court to affirm the Order of the District Court involved in this Appeal, without further proceedings, for the reasons stated in their Brief, filed herein on April 9, 1976, and in the Response of Appellees Virginia J. March, *et al.* in Opposition to Motion for a Stay of Distribution of Funds in the Hands of Defendant Pending Appeal and for Collateral Relief, filed herewith, incorporated herein, to which the Court is respectfully referred, in lieu of reiteration.

/s/ ISAAC N. GRONER
ISAAC N. GRONER
FREDERICK A. PROVORNY
NEAL M. SHEL

COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Appellees
Virginia J. March, et al.

COMMENT BY Earl C. Berger: Cole & Groner were never authorized by the plaintiffs (petitioners herein) to appear in behalf of plaintiffs on this appeal—whereby they change sides and oppose their former cestuis, who have authorized Mr. Berger to appeal and advocate their full legal entitlements, whereas since remand Cole & Groner have opposed such interests at every step.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

Civil Action #3437-70

No. 75-2262

VIRGINIA J. MARCH, et al.

v.

UNITED STATES OF AMERICA

EARL C. BERGER, *Appellant*

Before: WRIGHT and MACKINNON, *Circuit Judges*

Order

(filed July 1, 1976)

On consideration of appellant's motion for stay of distribution of funds, appellee's motion for summary affirmance, and of the responses thereto, it is

ORDERED by the Court that appellant's motion for stay of distribution of funds is denied, and, it is

FURTHER ORDERED by the Court that appellee's aforesaid motion for summary affirmance is granted.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

Per Curiam
(end of Order)

(*Note by E. C. Berger:* The motion for summary affirmance was not made by the real appellee, the defendant (United States) but by prior attorneys of record, Cole & Groner, Esqs., who filed a notice of appearence on appeal, labeling their former cestuis "appellees"; the plaintiffs did not authorize them to appear as *opponents* of their former cestuis, only Berger was authorized to appeal in behalf of the plaintiffs.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Caption Omitted in Printing)

Order

(filed July 14, 1976)

On consideration of appellant's motion for extension of time to file petition for reconsideration or for reconsideration en banc of this Court's order of July 1, 1976, it is

ORDERED that the aforesaid motion is granted and the time for filing for reconsideration is extended to and including July 30, 1976.

For the Court:

GEORGE A. FISHER, *Clerk*

By:

ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Caption Omitted in Printing)

Before: WRIGHT and MACKINNON, *Circuit Judges*

Order

(filed August 18, 1976)

On consideration of appellant's petition for reconsideration and for hearing *en banc*, and of the supplement thereto, it is

ORDERED by the Court that appellant's petition for reconsideration is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX I

LAW OFFICES
COLE AND GRONER
1730 K Street, N.W.
Washington, D.C. 20006

November 14, 1974

Earl C. Berger, Esquire
499 Hamilton Avenue
P.O. Box 1145
Palo Alto, California 94301

Dear Earl:

When the Court of Appeals decision in *March* was issued on Tuesday, I was in Islip, New York, taking a deposition in a case scheduled for trial in December. While I received the good news during a telephone call with the office on that day, it was not until last evening that I could read the decision and savor its full flavor.

It is always pleasant to win a case—particularly a large case like this one. But winning this case is especially gratifying for it is the culmination of so much work over so many years. It is a remarkable tribute, in particular, to your tenacity and faith, for you never waivered during a decade of heartbreaking defeats in a variety of courts.

There will now be many people who will point to Earl Berger and say "There is a lucky man". But they will not know the long and lonely days and nights which you spent in the Anthony House, and Statler Hilton and in our library working over your notes, reviewing the decisions and writing and rewriting memos and sections of the briefs. I never met a "lucky" man: but I have met men who have had vision and who have had diligence and who were willing to work long and hard against heavy odds and who have, in the end, succeeded. You are such a man and I am proud to be your friend.

Sincerely yours,

/s/ ALAN Y. COLE
Alan Y. Cole

APPENDIX J

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United tSates, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

APPENDIX K

28 § 1346. District Courts; jurisdiction

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not standing in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States. June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

(d) (2) Amended 1970 Pub. L. 91-350 (1a) to give District Courts concurrent jurisdiction up to $10,000 for salaries (See App. B, at p. 14a).

APPENDIX L

28 U.S.C. § 2411. Interest

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment. June 25, 1948, c. 646, 63 Stat. 973; May 24, 1949, c. 139, § 120, 63 Stat. 106.

APPENDIX M

28 U.S.C. § 2678. Attorney fees: penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

As amended July 18, 1966, Pub.L. 89-506, § 4, 80 Stat. 307.

APPENDIX N

Rule 19. Joinder of Persons Needed for Just Adjudication. (F.R.C.P.)

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be ade-

quate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX O

Rule 52. Findings by the Court (F.R.C.P.)

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX P

Rule 60. Relief from Judgment or Order (F.R.C.P.)

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellant court.

(b) *Mistakes; Inadvertence; Exclusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not

actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, ec. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

APPENDIX Q

Retainer

Undersigned hereby retains the American law firm of

LORBER, VOGEL & BERGER
16 Rue Chauveau
Neuilly sur Seine, France

and such associate counsel as it may engage, to take all appropriate steps to enforce my claim against the United States Government for unpaid portions of salary and wages due me as a school teacher in the Overseas Dependents' Schools operated by the Department of Defense, which salary was set under Public Law 86-91 (73 Stat. 213) enacted July 17, 1959.

My employment commenced 25 August 1961, and [terminated .....] I am still so employed (if still employed strike the word "terminated" and insert instead: "I am still so employed").

By way of compensation for said attorneys' professional services I hereby authorize them to deduct one-fourth of the gross recovery allotted to me, or, if the Court having jurisdiction, on its own motion, orders a different percentage or fee then such different percentage or fee shall be deducted.

It is understood that all expenses and costs incurred shall be ratably apportioned among the many claimants in relation to each claimant's gross award and deducted therefrom.

I hereby contribute the sum of $5.00 towards such expenses and costs; it being understood that if no award is made then my liability in the premises shall be limited entirely to the amount stated above as my contribution,

and that I will not be liable to anyone for professional services rendered.

Dated: 25 March 1965.

signature: /s/ VIRGINIA J. MARCH
full name printed in block letters:
VIRGINIA JEAN MARCH

name and address of current school printed in block letters:

Box 11855, APO 09285

permanent Stateside address, printed in block letters:

443 MISSISSIPPI, SAN FRANCISCO, CALIFORNIA
Phone: 647-3417

NOTE: Please indicate on the reverse-side of this sheet the various schools of ODS in which you have been employed, giving as much data as possible upon which to compute your claim. If MA please indicate.

APPENDIX R

Affidavit

STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA, ss:

JOSEPH B. CRAWFORD, being first duly sworn, deposes and says:

That presently he is Assistant Superintendent of Schools, Mt. Diablo Unified School District, Contra Costa County, California.

That he acted as the spokesman in negotiating the agreement for retaining the legal services of Mr. Earl C. Berger, and Mr. Berger's legal associates, in the year 1965, in behalf of the Overseas Education Association, Inc., (OEA) as representative of all teachers employed in the Overseas Dependents Schools operated by the Department of Defense. The Overseas Education Association Inc. (OEA) was then the recognized representative of overseas teachers, and still is.

Deponent was employed by the Department of Defense (DOD) as a classroom teacher during the period 1958 to 1967 when he resigned to qualify as a Doctor of Education at Harvard University, and is so qualified.

That in negotiating for Mr. Berger's professional services to advocate the rights of the Overseas teachers (to be paid salaries comparable to those prevailing in the United States in the larger urban district pursuant to Public Law 86-91) your deponent acted in concert with the members of the Executive Committee of OEA, which is composed of its elected officers and elected Area Representatives, who represent the teachers in the several diffrent Areas in the 29 foreign countries throughout the world. At that time deponent was President of OEA and Chairman of its Executive Committee (1964-65 and 1965-

66). That such negotiations for the professional services of counsel took place in Frankfurt, Germany, at a regular meeting of the Executive committee following litigation in the U.S. District Court, (Washington, D.C.) and the U.S. Court of Appeals (D.C.). That action, entitled *Mitchell, Driver, Aliano,* et al. vs. *United States,* sought to mandate the Secretary of Defense to implement the Overseas Teachers Pay & Personnel Practices Act, Public Law 86-91, to pay the teachers full salaries in accordance with that Act, which the Department of Defense (DOD) refused to do; instead DOD discounted statutory pay rates by approximately 27%.

To the disappointment of all concerned the trial court and the appellate court dismissed the complaint in *Mitchell.* It appeared hopeless that further litigation could achieve the desired results.

At that time annual dues for members of OEA were $5, which developed a total income of about $17,000 per year; same being used principally for the travel expenses of members of the Executive Committee and officers to travel to Frankfurt where bi-monthly meetings were held. OEA was clearly not in a position to finance further litigation.

Acting as spokesman for the teachers, your deponent inquired of Mr. Berger, who for more than ten years had been Legal Counsel to OEA without compensation, whether he would entertain handling the further litigation on a contingency basis, namely on a "no cure, no pay" basis. Mr. Berger was offered a contingency basis of one-third of sums actually recovered. A sample copy of the retainer form (signed by about 3,000 teachers) is attached. Mr. Berger voluntarily stated that 25% would be acceptable to him. His offer was gladly accepted.

Mr. Berger suggested that the matter be next presented to the U.S. Court of Claims. But at that time the Court of Claims would not entertain class actions. Each claimant

had to be named as a separate plaintiff. Claims were entered in that Court, and a separate filing fee was paid for each plaintiff.

Mr. Berger undertook to exhaust all remedies, in any and all courts, regardless of how much time or how many trips to Washington would be required, on the 25% contingency basis.

Inasmuch as the matter was being handled on a straight contingency basis, records were not kept of time devoted by Mr. Berger in our behalf. In spite of careful preparation and presentation, our claim was again turned down, this time by the Court of Claims. Since then Mr. Berger has been assisted by the prestigious law firm of Cole & Groner, Esqs., of Washington, D.C., well known for practice before the Supreme Court, but a Petition for a Writ of Certiorari to the Supreme Court was denied.

Apparently the Court of Claims, in a divided opinion decision, felt that the wording of the Pay Act calling for overseas teachers' salaries "in relation to" salaries for comparable services in urban districts in the United States, conferred "discretion" on the Secretary of Defense to pay salaries *out of* relation to salaries prevailing in the States. Inasmuch as the legislative history of the Pay Act unmistakably demonstrates Congressional intent to pay overseas teachers salaries *equal to* salaries paid in the States, Mr. Berger, accompanied by your deponent and Mr. Cecil E. Driver (former President of OEA, at that time OEA Executive Secretary) traveled to Washington, appeared before various Congressional Committees, and succeeded in having the Teachers Pay Act amended to substitute the words "in relation to", to: salaries "*equal to*" those prevailing in the United States.

Nevertheless the DOD again refused to honor the Pay Act. It continued to pay substantially less than rates provided by statute, paying salaries substantially *out of relation to* and *unequal* to Stateside salaries.

Mr. Berger was again asked by the Executive Committee of OEA, and by your deponent as President of OEA, whether he would test the amendment to the Act on the same basis as before, namely on the 25% contingency basis. Mr. Berger consented, and through him the law firm of Cole & Groner. It was felt unnecessary to procure new Retainers as the original Retainers are without limitation of time, applying to *all* litigation aimed at the common, continuing objective. Accordingly a new action entitled *Chambers, et al.* vs. *United States* was commenced in the U.S. District Court, Alexandria, Virginia. However the Court referred to the split decision of the Court of Claims which held that salaries "in relation to" Stateside salaries permitted the Secretary of Defense to pay salaries at "his discretion" and dismissed the Complaint, although it was based upon the Amendment to the Pay Act mandating salaries "equal to" Stateside salaries. The U.S. Circuit Court of Appeals, (Richmond, Va.) affirmed the dismissal.

Another writ to the Supreme Court failed.

The quest for justice failed again. Further attempts seemed hopeless. Nevertheless Mr. Berger felt that because our cause was just, justice would finally prevail. Again he consented to pursue the cause based on the same 25% contingency basis, and the instant action entitled *March et al.* vs. *United States* was commenced in the U.S. District Court for the District of Columbia in November 1970. Finally the Honorable June Green, Judge, granted partial relief. The Government appealed, the teachers cross-appealed for the other pay factors involved in computing salaries. The U.S. Court of Appeals rendered a decision granting plaintiffs substantially all the relief prayed for, by decision dated November 12, 1974.

It is important to point out that, at no time during the 10 years of litigation did anyone take exception to the fee basis noted above. No member of OEA, no non-member, ever raised any question as to the agreed percentage fee.

Deponent is informed that the OEA Executive Committee invited Mr. Berger after November 12, 1974, to explain what remained to be done to effect payment. Mr. Berger did this, explaining how complicated the matter was, involving separate computations for more than 7,000 teachers per year, for at least 9 years, thus approximately 63,000 (or more) separate computations, because of the different years and different rates per year, different steps in grade per teacher, different entitlements per teacher based upon individual educational credits, etcetera. Mr. Berger outlined the history of this litigation, that goes back more than a dozen years.

Your deponent points out that the 25% contingent basis anticipated *one action,* not a series of separate actions over a period of ten years. However, Mr. Berger and his co-counsel fully and diligently processed three (3)separate actions in full including two appeals, and two writs to the Supreme Court; and finally succeeded. A matter of plain arithmetic demonstrates that three separate actions divided into the 25% results in 8.33% per separate and distinct lawsuit; and that 2%, instead of 25%, results in an *ex post facto discount of 87.5%!* It was not the teachers' intention to penalize their counsel and procure 10 years of valuable legal services for a token 2%.

Accordingly your deponent unhesitatingly joins in the sense and desires of the current OEA Executive Committee, and OEA officers, not to disavow the Agreement made years ago, that was negotiated by your deponent and thereafter reconfirmed. The Agreement is a continuing Agreement, without limitation of time, without limitation of efforts, skill and persistence, to the great benefit of thousands of *American* teachers in foreign countries. And, without this litigation the teachers would continue to lose pay in the future.

Deponent will be pleased to appear before this Court to testify to the foregoing and any other information the Court desires. He is informed that all his successors Presidents of Overseas Education Association desire to do the same, and likewise members of the OEA Executive Committee.

Dated: August 4, 1975.

/s/ JOSEPH B. CRAWFORD
Joseph B. Crawford, Ed.D.

(Subscription Omitted in Printing)

APPENDIX S

Statement Concerning Fee Arrangement in Teachers' Back-Pay Litigation

Undersigned is the VIRGINIA J. MARCH, first named plaintiff in the action of March et al vs. United States, No. 3437-70 U.S. District Court, Washington, D.C.

I was the elected Secretary of Overseas Education Association, Inc. in 1967, and thereafter; as such a Member of the Executive Committee, I took part in and clearly recall all negotiations of the Committee concerning the authorization and fee arrangement made with Mr. Earl C. Berger, as detailed in the Affidavit of Joseph B. Crawford, dated August 4, 1975, which I have read and confirm all statements therein. I personally agreed to the 25% contingency retainer in the action before this Court, individually and in my representative capacity. Briefly: it was clearly understood by the Executive Committee, and by all teachers with whom I have ever had contact, that the fee arrangement and authorization was a continuing one until the back-pay problem would be finally concluded.

The foregoing statement is made under penalty of perjury.

Dated: August 4, 1975

/s/ VIRGINIA M. CRAWFORD
VIRGINIA J. MARCH, now
(Mrs.) Virginia M. Crawford.

No. 76-693

In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL C. BERGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-693

EARL C. BERGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals in this civil matter was entered on July 1, 1976 (Pet. App. F), and a petition for reconsideration and for rehearing *en banc* was denied on August 18, 1976 (Pet. App. H). The time for filing a petition for a writ of certiorari was not extended and, accordingly, the 90-day period provided in 28 U.S.C. 2101(c) for petitioning in civil cases expired on November 16, 1976. The petition was filed on November 17, 1976 (a Wednesday).

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418. Accordingly, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

DOJ-1977-01

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-693

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I.F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated,
Petitioners,

v.

THE UNITED STATES, Respondent.

EARL C. BERGER, Petitioner,

v.

THE UNITED STATES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I.F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI AND JOHN MORRISON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF VIRGINIA J. MARCH et al.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This petition should be denied for a number of independently valid reasons.

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* In this class action, the undersigned are the counsel for this class of Plaintiffs-Appellees (Judgment of District Court, Par. 1E; Petition ("Pet.") 2a) and have been counsel throughout, including in the Court below, both in the appeal on the merits (Pet. 13a) and with respect to the Orders involved in this Petition (Pet. 42a, 44a).

1. The petition was not filed within 90 days of the denial of the petition for reconsideration and for rehearing en banc. It was filed on November 17, 1976, 91 days subsequent to the denial on August 18, 1976 (Pet. 45a). Consequently, the petition is out of time, as a jurisdictional matter. 28 U.S.C. §2101(c); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417-418 (1923); cf. Allegrucci v. United States, 372 U.S. 954 (1963).

2. If anything is clear on the face of this petition, it is that a unique factual picture is presented in this case. There is here no issue of general importance, no conflict with decisions of this Court or other Circuit Courts of Appeals -- in short, no reason for this Court to consider the matter and review the Orders below affirming the action of the District Court.

3. In any event, the decisions below are plainly correct. The facts of record, particularly the affidavits submitted in the District Court in opposition to the motions filed by Petitioner Berger, set out in the Appendix for Appellees Virginia J. March, et al., in the Court

below, demonstrate that the only question presented in this case is whether the District Court abused its discretion in striking a Petition to Amend Judgment filed in propria persona by an attorney who was "Of Counsel" to Plaintiffs in a class action, when:

1. The Petition was filed 71 days after the entry of the Judgment;

2. The Petition contained no new fact or contention;

3. The Petition objected principally to the counsel fee awarded by the District Court after a hearing had been conducted on that very issue, the objection being that the District Court lacked power to award a fee of less than 25% of the recovery because the Petitioner's former law firm had retainer agreements with a minor percentage of the entire class providing for a fee of "one-fourth of the gross recovery * * * or, if the Court having jurisdiction, on its own motion, orders a different percentage or fee then such different percentage or fee shall be deducted" (Pet. 56a; emphasis added) -- precisely what did happen;

4. The Petition objected to a limitation of $10,000 on recoveries to individual members of the class in an action under the Tucker Act, 28 U.S.C. §1346(a)(2), which expressly states that limitation (Pet. 14a, n. 1, 48a);

5. The Petition objected to the absence in the Judgment of a provision for interest on recoveries to individual members of the class to run against the Government, simply disregarding 31 U.S.C. §724(a), applicable to cases brought under the Tucker Act, 28 U.S.C. §1346(a)(2), which in effect precludes an award of interest against the United States under the circumstances stated in the Petition; and

6. The affidavits submitted in connection with the Petition established without dispute that the Petitioner had personally agreed to the terms of the Judgment entered by the District Court and personally authorized counsel of record to proceed with the steps necessary to request the Court to enter that Judgment.

Plainly, the District Court did not abuse its discretion; and the Court below was correct in summarily affirming the District Court Order. In any event, nothing is here presented meriting the attention of this Court.

CONCLUSION

For the reasons stated in this Memorandum, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-693

VIRGINIA J. MARCH, JOHN H. LEHR, ARTHUR TINGLEY, LUCY I. F. JOHNSON, ELIZABETH A. MESSMER, MARY ALICE REKUCKI, and JOHN MORRISON, on behalf of themselves and all others similarly situated, *Petitioners*,

vs.

THE UNITED STATES, *Respondent*,

EARL C. BERGER, *Petitioner*,

vs.

THE UNITED STATES, *Respondent*.

REPLY BY PETITIONERS TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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EARL C. BERGER, *Petitioner,*

vs.

THE UNITED STATES, *Respondent.*

REPLY BY PETITIONERS TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

Opposition was interposed by Respondent, The United States, to the Petition for a Writ of Certiorari to the United States Court of Appeals (for the District of Columbia Circuit) on the sole ground that the Petition was allegedly filed one (1) day late. That Opposition does not comment on the merits.

I

It is respectfully submitted that the Petition was timely filed within the usual 90 day period, because:

The Court of Appeals' Order of August 18, 1976 which denies petitioners' Motion for reconsideration and a hearing was not docketed in the district court until the next day, August 19, 1976.[1] Therefore computation of the 90 day period would commence the day after, on August 20, 1976, and thus within the 90 day period.

II

The interlocutory judgment on remand (App. A, Petn.,p.1a-12a) did not comply with the original opinion and decision of the Court of Appeals (App. id., B, pp.13a-37a) in that, among other things, it limited damages to $10,000 per individual (there are an estimated 19,500 individual class plaintiffs) in spite of the fact that after action was commenced on November 20, 1970, additional damages accrued per individual during the 4 years consumed in obtaining the original decision on appeal for back-pay under P.L. 86-91(1959) as amended by P.L. 89-391 effective April 14, 1966.

The prior decision on appeal, of November 12, 1974 (App. B, to Ptn.) provides that:

> "IV. THE TEACHERS' RIGHTS TO DAMAGES
>
> "As we noted above, the District Court found the Department's practices inconsistent with the

[1]Please see Exhibit 1 annexed to Motion (January 1977) to resolve the issue of timely filing.

> statutory scheme in one respect. The court granted the teachers injunctive relief on that count, but denied their claim for back pay damages.
>
> The trial court gave no reason for denying the teachers' prayer for damages, and we are unable to discern any sound reason to support the denial. The teachers had a statutory right to receive the pay they now demand as damages. As a direct result of the Department's erroneous interpretation and application of the Act, they have suffered a recognizable legal injury. In addition to an injunction against the condemned practices, they should receive what has been rightfully and legally theirs since April 14, 1966. As the Supreme Court has declared, '(a) disregard of the command of the statute is a wrongful act, and where it results in damage to one of a class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied'."
>
> . . . . "We hope this decision will finally resolve a dispute that has already lasted far too long." (remanded)
>
> 506 F.2d 1306, 1320.

That decision does not limit petitioners' actual damages. It mandates that "They should receive what has been rightfully and legally theirs since April 14, 1966." This can only mean *all* of their damages including damages that accrued pending suit, all damages suffered since April 14, 1966. Because the remand court limited actual damages petitioners returned to the Court of Appeals.

III

It is respectfully submitted that when the petitioners again appealed that suspended the trial court's jurisdiction to do anything. Therefore until the Court of Appeals order of August 18, 1976 was docketed in the trial court on August 19, 1976, the computation of time commenced the next day, August 20, 1976, within which to institute further proceedings in the Supreme Court per S.C. Rule 34 (1) which in pertinent part provides:

> "1. In computing any period of time prescribed or allowed by these rules, by order of court, *or by any applicable statute,* the day of the act, event, or default after which the designated period of time begins to run is not to be included . . ." (emphasis supplied)

IV

Petitioners suggest, arguendo, without conceding the alleged one (1) day late factor, nevertheless this Court can, and often does, relax procedural rules in the exercise of its discretion when the ends of justice so require. Note that Rule 34, S.C., supra, refers to *applicable statutes* as well as S.C. Rules. In *Schact v. United States,* 398 U.S. 58, 64 this Court ruled:

> "The procedural rules adopted by this Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require."

As noted in the Petition for a Writ and in the Motion of Petitioners (January 1977) to resolve the matter of timely filing, it is clearly demonstrated that a very special and extraordinary situation developed which calls for the exercise of this Court's discretion to waive the alleged one (1) day late factor, if indeed filing occured one day late, which we submit is not so. Certainly no prejudice can be suffered by the Respondent who has ill treated its teacher employees for more than a decade while stubbornly refusing to honor the clear statutory mandate of Congress. During these many years the Respondent has profited at the expense of the teachers, using their money without interest.

Whatever back pay dollars the teachers realize ultimately are worth considerably less, because of the effects of ongoing inflation. A dollar is no longer a real dollar; the teachers are fully entitled to every such depreciated dollar.

V

In the interest of brevity petitioners respectfully refer this Court to the very exceptional reasons why it should exercise its discretion in the premises, as outlined in petitioners' Motion of this month concerning timeliness. Because of the sudden, unforeseen dire emergency that enveloped petitioners' attorney, Mr. Berger, just as he was about to complete the Petition and ready it for printing and filing. He was duty bound to come to the assistance of his sister, Mrs. Douglas. Mr. Berger is the only surviving male rela-

tive in his family, and thus was deterred for a whole month (October 13 to November 14, 1976) from completing and filing that Petition.

Mr. Berger had to abandon his professional duties, immediately fly to New York from California to arrange his sister's surgery, for special intensive care nurses around the clock, for oxygen tanks, etcetera, and then also make funeral arrangements, after which only to discover that his sister's apartment had been burglarized, involving missing records which had to be reconstructed from the debris in his blind sister's apartment, burglarized while his sister was dying in a hospital; and then Mr. Berger also had to attend to bills incurred during his sister's last illness.

It may also be noted that Mr. Berger, himself, is a cardiac subject, having had open heart surgery and is required to observe a conservative program as far as possible. He is 71 years old; never before in his 48 years of practice has he ever been late in filing any pleading—never.

VI.

Again, in the interest of brevity, reference is made to the matters set forth in the Petition itself and also the current Motion concerning timeliness.

The law firm of Cole & Groner, Esquires, who also present Opposition, is without standing. That law firm was formerly engaged by Mr. Berger to assist him and advocate the teachers' rights, only because Mr. Berger was not a resident practitioner in the District of Columbia, and so is shown as Of Counsel.

Cole & Groner did cooperate up to and only until the favorable Court of Appeals' decision came down November 12, 1974; immediately thereafter, after that decision became nonappealable Cole & Groner changed over to the other side of the same case, and gratuitously, without authority, joined the forces of the Respondent to the distinct prejudice of their former *cestuis*.

In any event, the Cole & Groner "Opposition" completely fails to discuss the real merits of the Petition, and adopts the Government's alleged one day late premise. Although the Petition points out that Cole & Groner are without standing, they elect not to meet that issue in their Opposition. Indeed a strange happening—where attorneys abandon their cestuis and further attempt to effect a distinct loss on those cestuis.

CONCLUSION

For the reasons herein noted, as well as the reason set out in petitioners' Motion concerning timeliness (January 1977), it is respectfully prayed that this Court grant certiorari and permit a proper review on the merits.

Respectfully submitted,

EARL C. BERGER
Attorney for Petitioners

JOHN W. BERGEN
Of Counsel

January, 1977.